No. 87-1054-CFX Title: Firestone Tire and Rubber Company, et al., Petitioners
Status: GRANTED v.
Richard Bruch, etc., et al.

Docketed:
December 23, 1987 Court: United States Court of Appeals for the Third Circuit

See also:
88-586 Counsel for petitioner: Wald,Martin

Counsel for respondent: Markowitz,Paula, Silberman,David M.

Entry	Date	Note	Proceedings and Orders
1	Dec 23 1987	G	Petition for writ of certiorari filed.
2	Dec 23 1987		Appendix of petitioner The Firestone Tire and Rubber Company, et al. filed.
4	Jan 21 1988		Waiver of right of respondents Richard Bruch, et al. to respond filed.
3	Jan 22 1988		Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
5	Jan 27 1988		DISTRIBUTED. February 19, 1988
6	Feb 12 1988	F	Response requested -- CJ.
8	Mar 14 1988		Brief of respondents Richard Bruch, etc., et al. in opposition filed.
7	Mar 16 1988		REDISTRIBUTED. April 1, 1988
9	Mar 23 1988	X	Reply brief of petitioners The Firestone Tire and Rubber Company, et al. filed.
10	Apr 4 1988		Petition GRANTED.
			**
12	May 6 1988		Order extending time to file brief of petitioner on the merits until June 9, 1988.
13	May 12 1988		Record filed.
		*	Certified copy of briefs, appendices and partial proceedings received.
14	May 19 1988		Record filed.
		*	Certified copy of original record, box, received.
15	Jun 9 1988		Brief amicus curiae of Travelers Insurance Co. filed.
16	Jun 9 1988		Brief amicus curiae of ERISA Industry Committee filed.
17	Jun 9 1988		Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
18	Jun 9 1988		Brief amici curiae of American Council of Life Insurance, et al. filed.
19	Jun 9 1988		Brief of petitioners The Firestone Tire and Rubber Company, et al. filed.
20	Jun 9 1988		Joint appendix filed.
22	Jun 23 1988		Order extending time to file brief of respondent on the merits until August 1, 1988.
24	Jul 5 1988		Order extending time to file brief of respondent on the merits until August 15, 1988.
25	Aug 15 1988		Brief amicus curiae of Pension Rights Center filed.
26	Aug 15 1988		Brief amicus curiae of American Assn. of Retired Persons filed.
27	Aug 15 1988		Brief of respondent filed.
28	Aug 15 1988		Brief amicus curiae of Plaintiff Employment Lawyers Assn.

No. 87-1054-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
30	Aug 15 1988	X	Brief amicus curiae of United States filed.
29	Aug 18 1988		CIRCULATED.
33	Aug 23 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Aug 26 1988	G	Application (A88-169) to extend the time to file a reply brief from September 14, 1988 to September 28, 1988 by the Petitioner, submitted to Justice Brennan.
32	Aug 31 1988		Application (A88-169) granted by Justice Brennan extending the time to file until September 28, 1988.
35	Sep 28 1988	X	Reply brief of petitioners The Firestone Tire and Rubber Company, et al. filed.
36	Sep 30 1988		Set for argument. Wednesday, November 30, 1988. (1st case) (1 hr.)
34	Oct 3 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
37	Nov 30 1988		ARGUED.

87 1054

No. ______

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,

v.

RICHARD BRUCH,
ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does not ERISA's intent that trust principles govern plan fiduciaries' actions preclude de novo judicial review of a benefits denial using contract principles and require review under the arbitrary and capricious standard of trust law?

2. Must not a former employee have at least a colorable claim to benefits to come within the definition of a "participant" in an employee benefit plan covered by ERISA?

PARTIES TO THE PROCEEDING

The named appellants in the United States Court of Appeals for the Third Circuit were Richard Bruch, John R. Chubb, Albert Schade, Richard Schollenberger, Ronald R. Smith, and Leonard A. Smolinski. These named parties represented three classes comprised of various groups of the non-union salaried employees who were working in the five plants in Pottstown, Pennsylvania; West Caldwell, New Jersey; Perryville, Maryland; Salisbury, Maryland; and Baton Rouge, Louisiana that comprised the Plastics Division of The Firestone Tire & Rubber Company ("Firestone") on November 30, 1980, when the Division was sold to the Hooker Chemical Division of the Occidental Petroleum Corporation. The first class excluded those employees who either retired upon the sale or were paid termination pay with regard to their employment with Firestone. The second class included those employees who did not qualify for normal or early retirement under Firestone's Retirement Plan for Salaried Employees on or before the sale. The third class included those employees who had non-vested accrued benefits credited to their accounts under Firestone's Stock Purchase and Savings Plan, except for those employees with regard to whom Firestone's contributions to the plan had fully vested. Appellants Bruch, Schade, and Smolinski had individual claims as well.

Appellees in the court of appeals were Firestone, The Firestone Tire & Rubber Company Retirement Plan for Salaried Employees, and The Firestone Tire & Rubber Company Stock Purchase and Savings Plan. Firestone has no parent corporation. Firestone's non-wholly owned subsidiaries are Firestone N.Z. Limited (New Zealand); Firestone Portuguesa S.A. (Portugal); and Firestone Hispania S.A. (Spain). Firestone's affiliates are Akron Priority Corporation (Ohio); Corporate Officers & Directors Assurance Ltd. (Bermuda); Delta Holdings, Inc. (Delaware); EXEL Limited (Bermuda); Firestone East Africa (1969) Limited (Kenya); Philtread Tire & Rubber Corporation (Philippines); and Hulera el Centenario S.A. (Mexico).

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Firestone Tire and Rubber Company and certain of its benefit plans (collectively "Firestone") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 31, 1987. That judgment involves two important and recurring questions under the Employee Retirement Income Security Act of 1974 ("ERISA"): (1) what standard of judicial review should apply to a plan fiduciary's denial of benefits and (2) who is a "participant" in a benefit plan and thereby entitled to information about the benefits and operation of the plan. There are irreconcilable differences among the circuits with respect to each of these questions. Review by this Court is urgently needed to guide the lower courts and to reaffirm ERISA's intent to promote the establishment of privately administered employee benefit plans.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (A45-A72)[1] is reported at 640 F. Supp. 519. The opinion of the United States Court of Appeals for the Third Circuit (A1-A44), which reversed the decision of the district court on the questions presented by this Petition, is reported at 828 F.2d 134. The order of the court of appeals denying rehearing and rehearing in banc (A75-A76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1987. The order denying rehearing and rehearing in banc was entered on September 25, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), and section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), contain fiduciary responsibility provisions relevant to the standard of review question. The term "participant" is defined in section 3(7) of ERISA, 29 U.S.C. § 1002(7). Section 104(b), *id.* § 1024(b), sets forth a benefit plan administrator's obligations to disclose information about the plan to participants, and section 502(c), *id.* § 1132(c), permits an award of damages for failure to comply with these obligations. These statutory provisions and other relevant portions of ERISA and regulations promulgated thereunder are set forth in the Appendix. (A77-A87)

STATEMENT OF THE CASE

Plaintiffs represent the class of non-union salaried employees who were working in the Plastics Division of Firestone and continued in their jobs after the Division was sold as a going concern in 1980 to the Hooker Chemical Division of Occidental Chemical Corporation. (A4) Plaintiffs brought this action under ERISA to recover termination pay and other benefits allegedly due them as a result of the sale.[2] Certain individual plaintiffs also claimed discretionary damages under section 502(c) of ERISA, 29 U.S.C. § 1132(c), for alleged deficiencies in Firestone's responses to requests they made after the sale for information about Firestone's benefit plans.[3]

On cross motions for summary judgment, the district court ruled in Firestone's favor on all of plaintiffs' then pending claims. (A73) The court held that Firestone's determination that plaintiffs were not entitled to reduction in force ("RIF") termination pay was neither arbitrary nor capricious. (A56) The court noted that nothing in Firestone's policies or in the generally accepted meaning of the term "reduction in force" suggests that employees who remained in their jobs and continued to draw the same wages after the sale of a plant have suffered a RIF. (A53-A54) The court also denied plaintiffs' section 502(c) damage claims, holding (1) that upon the sale the individual requestors ceased to be "participants" in Firestone's benefit plans entitled to information about the plans (A71-A72) and (2) that they had not been prejudiced by Firestone's responses to their requests for information (A72).

On appeal, the court of appeals reversed both of these holdings. The court recognized "the clear weight of authority" supporting use of the arbitrary and capricious standard in

1. References to "A" pages are to the Appendix to this Petition.

2. Plaintiffs also claimed various retirement, stock, and vacation benefits, which are described in the court of appeals' opinion. (A4-A6) All of these claims have been withdrawn, settled, or resolved in favor of Firestone. (A3, A5-A6 n.2)

3. Plaintiff Bruch claimed that he never received a response to his written request for information about Firestone's stock purchase plan. (A71) In their motion for summary judgment, plaintiffs Smolinski and Schade also claimed for the first time that Firestone failed to comply with requests for information concerning its termination pay policies. (A69, A71) (Smolinski had previously complained of inadequacies in Firestone's four letters responding to his request for information about retirement benefits. (A71))

reviewing benefits denials under ERISA (A8), but nonetheless held that Firestone's denial of termination pay should be reviewed de novo (A3). After noting that the deferential arbitrary and capricious standard was derived from the common law of trusts, which is the basis for the fiduciary standards of ERISA (A14), the court concluded that under trust law courts "will not defer to a trustee's judgment when a conflict of interest threatens the trustee's impartiality" (A15). In the court's view, Firestone's status as the sole administrator of its unfunded termination pay plan created such a conflict of interest because "every dollar provided in benefits is a dollar spent by defendant Firestone." (A21) Based on this conflict of interest the court distinguished decisions involving benefit funds governed by section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). The court noted that while section 302(c)(5) establishes fiduciary standards similar to those contained in ERISA (A14), it also assures the impartiality of the plan trustees by requiring that employers and employees be equally represented in the administration of a fund (A15, A21).

Having rejected the trust-based arbitrary and capricious standard of review, the court of appeals held that Firestone's adoption of a termination pay plan was an offer of a "unilateral contract" that its employees accepted by continuing employment with the company. (A30) The court therefore concluded that the district court should not defer to Firestone's decision to deny benefits but should rather determine for itself the validity of that decision "tak[ing] as [its] starting point the principles governing construction of contracts between parties bargaining at arms' length." (A25)[4]

On the damage claims under section 502(c) of ERISA, the court of appeals held that all former employees claiming a right to benefits under a plan are "participants" in the plan within the meaning of section 3(7) of ERISA, 29 U.S.C. § 1002(7). (A41-A42) The court thus concluded that the individual plaintiffs were entitled to information about Firestone's benefit plans in response to their requests regardless of whether they had colorable claims to benefits under the plans. (A43) The court explicitly rejected the contrary positions of two other circuits on this point (A40-A41) and remanded the section 502(c) claims along with the termination pay claim for further proceedings in the district court (A44).

4. The specific principles mentioned by the court were "common usage in the trade," past practice under the plan, and the district court's supplying of a "reasonable" term in the absence of agreement between the parties as to a portion of the contract. (A29-A31)

Firestone's petition for rehearing and rehearing in banc was denied (A75-A76), and Firestone now seeks review in this Court.

REASONS FOR GRANTING THE WRIT

The circuits have taken a range of vastly differing approaches to both of the questions presented by this Petition, and only a ruling by this Court can create the uniformity that Congress intended to establish by enacting ERISA and that is now so obviously lacking. This particular case presents the conflict in its starkest form because identically situated employees of the petitioner company have had their benefit claims reviewed by two different circuits with diametrically opposed results.

The court of appeals' decision not only goes far beyond that of any other circuit that has addressed either issue raised here, it also directly contravenes the public policies Congress adopted in passing ERISA. By subjecting certain ERISA plan fiduciaries' claims determinations to de novo review under contract principles, the court abolished the congressionally mandated discretion of these fiduciaries to decide the validity of benefit claims. Similarly, by defining a "participant" in a benefit plan to include all former employees, the court ignored a key portion of the statutory definition of this term and imposed significant obligations on plan administrators to provide information to individuals who can never be entitled to benefits.

If these radical holdings are permitted to stand, millions of employee benefit plans will be affected. The federal courts

will be flooded with litigation, and some plaintiffs will be able to engage in forum-shopping as they seek the court most likely to grant their claimed benefits or section 502(c) damages. Employers and other administrators and fiduciaries will have to defend these lawsuits and to run the risk of being found in breach of their duties if the courts do not determine that they made the most reasonable decision. An inevitable result of these burdens will be the discontinuance or limitation of some benefit plans — a result that Congress specifically sought to avoid in framing the obligations of ERISA. The decision thus cries out for review and reversal by this Court.

I. THE COURT OF APPEALS' DECISION REQUIRING DE NOVO REVIEW OF A FIDUCIARY'S DENIAL OF BENEFITS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE LANGUAGE AND INTENT OF ERISA AS ILLUMINATED BY DECISIONS OF THIS COURT.

Every circuit has held that in general the decision of the fiduciary of an employee benefit plan governed by ERISA must be affirmed by a reviewing court unless the decision is "arbitrary and capricious."[5] Although the circuit courts' understanding of how the standard should be applied varies significantly from one case to another,[6] the Third Circuit's decision to abandon the standard in a benefits denial case under ERISA is unprecedented.

5. *See, e.g., Jestings v. New England Telephone & Telegraph Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan*, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985); *LeFebre v. Westinghouse Electric Corp.*, 747 F.2d 197, 204 (4th Cir. 1984); *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149-50 (6th Cir. 1985); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Quinn v. Burlington Northern Pension Plan*, 664 F.2d 675, 678 (8th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Peckham v. Board of Trustees of the International Brotherhood of Painters*, 653 F.2d 424, 426 (10th Cir. 1981); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984); *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982).

The narrowest possible reading of the court of appeals' holding is that the denial of benefits under an unfunded employer-administered termination pay plan is subject to de novo review as if it were a contract between the employer and the former employees. Even on this construction, the holding conflicts with the decisions of seven other circuits — including one that reviewed the very termination pay plan at issue here. *See, e.g., Schwartz v. Newsweek*, 827 F.2d 879, 881 (2d Cir. 1987); *Holland v. Burlington Industries*, 772 F.2d 1140, 1148-49 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987) (reviewing this plan); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986) (per curiam); *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-21 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985). Each of these cases applied the arbitrary and capricious standard.

Several of these circuits have expressed concern about applying the arbitrary and capricious standard in the context of an unfunded employer-administered termination pay plan. The Ninth Circuit has decided to preserve the standard but to accord "less deference" to the fiduciary's determination. *Jung v. FMC Corp.*, 755 F.2d at 711-12.[7] And just last month the

6. *Compare, e.g., Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985) ("it is not much of an overstatement" to say that a decision is not arbitrary and capricious "whenever a court can review the reasons for the decision without a loud guffaw") *with Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (factors to be considered in applying the arbitrary and capricious standard include "uniformity of construction," "reasonableness" of the fiduciary's reading of the plan, "unanticipated costs," "internal consistency" of the plan, administrative regulations, "factual background" of the decision, and "inferences of lack of good faith").

7. The district court in this case followed this precedent and upheld Firestone's denial of termination pay even under closer scrutiny. (A53)

Eighth Circuit questioned use of the standard but considered itself bound to follow its established precedent. *Agee v. Armour Foods Co.*, No. 87-1096 (8th Cir. Nov. 25, 1987).

The Third Circuit's decision also affects many non-termination pay plans because the court speaks generally of using de novo review whenever a plan administrator has a "conflict of interest." (A15) Such a conflict would naturally arise whenever an employer administers any unfunded plan.[8] Moreover, the court states that a conflict also exists when "the employer's contributions [to a funded plan] in a given year are determined by the cost of satisfying plan liabilities in the prior year."[9] Application of the court's holding in these situations is contrary to many more decisions than can be specifically enumerated here.[10]

The court of appeals' decision has thus fostered precisely the "patchwork scheme of regulation" of employee benefit

8. Employers in this country sponsor approximately 4.5 million welfare benefit plans covering some 65 million participants. Pension & Welfare Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act 1986 Report to Congress* i. We are aware of no data concerning how many of these plans are funded, but all welfare benefit plans are exempt from ERISA's funding requirements. *See* 29 U.S.C. § 1081(a)(1).

9. Of the 729,000 private pension plans that filed reports with the Internal Revenue Service in 1982, almost 220,000 (covering close to 24 million participants) were "defined benefit" plans in which contributions were actuarially determined on the basis of the benefits expected to become payable. Office of Pension & Welfare Benefit Programs, U.S. Dep't of Labor, *The Handbook of Pension Statistics 1985* 60 & 62 Table 2. Moreover, 18 million of the employees surveyed by the Bureau of the Census in 1983 not covered by a union contract were participants in a pension plan of which the employer was most likely the fiduciary. *Id.* 91 Table 13.

10. Other circuits have also questioned applicability of the arbitrary and capricious standard to certain funded plans. For example, the Ninth Circuit has applied its less deferential version of the standard to an employer fiduciary's decision under a funded plan when that fiduciary was found to have a financial conflict. *See Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152-53 (9th Cir. 1986). Similarly, the Sixth Circuit recently noted in another conflict case that "[w]ere we writing on a clean slate, we might well be persuaded that stricter standard of review should apply." *Varhola v. Doe*, 820 F.2d 809, 813 (6th Cir. 1987).

plans that ERISA was designed to end. *See Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217 (1987); *see also* H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650. Not only is the court's holding in direct conflict with that of other circuits, but every aspect of its rationale also has been rejected by this Court or by other circuits. As we will briefly demonstrate, these irreconcilable differences in reasoning have arisen because the court of appeals embarked on its own "policy analysis" instead of following congressional intent.

Application of Contract Rather Than Trust Principles

The most glaring defect in the court of appeals' reasoning is its conclusion that contract principles rather than trust principles should govern review of an ERISA plan fiduciary's decision. (A25-A26) Examining the language and legislative history of the statute, this Court has repeatedly held that courts construing ERISA are to look to trust law, not contract law. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 570-74 (1985); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 328-34 (1981); *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 152 (1985) (Brennan, J., concurring).[11]

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), states that the overriding fiduciary duty of a plan trustee is to

11. On a related issue, every circuit that has considered the question has concluded that claimants are not entitled to a jury trial under ERISA because, among other reasons, their rights are governed by trust rather than contract law. *See, e.g., Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980); *Crews v. Central States, Southeast & Southwest Areas Pension Fund*, 788 F.2d 332, 338 (6th Cir. 1986); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *In re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985); *Chilton v. Savannah Foods & Industries*, 814 F.2d 620, 623 (11th Cir. 1987).

"discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." The statute thus tracks the classic statement of a common law trustee's duty "to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts § 170 (1959). This tracking was not inadvertent. "The fiduciary responsibility section ... codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649.

Given the genesis of ERISA's fiduciary standards in the common law of trusts, Congress plainly intended the courts to apply under ERISA the same standard of review that prevails under trust law. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); *see Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Gilbert v. United States*, 370 U.S. 650, 655 (1962). As section 187 of the Restatement (Second) of Trusts makes clear, a trustee's actions are reviewed under the deferential "abuse of discretion" standard:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

The court of appeals concluded that this standard is abandoned under the common law "when a conflict of interest threatens the trustee's impartiality." (A15) However, the Restatement (upon which the court purported to rely) makes it clear that the existence of a conflict of interest does *not* alter the standard but is merely to be weighed as a "factor in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187 Comment d (1959). A court will interfere with the trustee's discretion only if the plaintiff produces evidence that the trustee in fact was motivated by and acted from an improper purpose. *Id.* § 187 Comment g; *id.* § 170 Comment t; *id.*§ 170 Illustration 1; *accord* III A. Scott, *The Law of Trusts* § 187.5 at 1524 (3d ed. 1967).

Common law trust cases not only confirm this analysis but hold a deferential standard of review to be particularly appropriate where the settlor of the trust was aware of a conflict of interest when establishing the trust and nonetheless conferred discretionary power on the trustee. *See, e.g., Childs v. National Bank*, 658 F.2d 487, 490, 494 (7th Cir. 1981); *Goldman v. Rubin*, 292 Md. 693, 441 A.2d 713, 724 (1982); *Svenson v. First National Bank*, 5 Mass. App. 440, 363 N.E.2d 1129, 1136-37 (1977); *Turnure v. Turnure*, 89 N.J. Eq. 197, 104 A. 293, 295 (1918); *In re Kellogg's Trust*, 35 Misc. 2d 541, 230 N.Y.S.2d 836, 840 (Sup. Ct. 1962); *In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411, 415 (1950). The basic rationale for deference in this situation is to ensure that decision-making authority rests with the person to whom it has been committed. *See generally* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982).

This rationale for deferring to the discretionary decision of a fiduciary who was known in advance to have a potential conflict of interest is directly applicable here. Despite its knowledge of the potential for a conflict of interest, Congress unquestionably intended employer fiduciaries to exercise discretion with respect to ERISA plans. Service as a fiduciary by definition requires the exercise of discretion. *See* 29 U.S.C. § 1002(21)(A)(iii). Moreover, ERISA expressly provides that its comprehensive prohibitions on conflict of interest transactions (*see* 29 U.S.C. §§ 1106-1107) do not prevent an employer or his representative from serving as a fiduciary (*id.* § 1108(c)(3)). *See Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410-12 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). In fact, Congress *required* employers to act as fiduciaries by serving as plan administrators in certain circumstances. *See* 29 U.S.C. § 1002(16)(A)(ii).

By abandoning trust principles in favor of de novo review in this case, the court of appeals abolished the discretion that Congress intended employer fiduciaries to exercise. Congress determined to establish only minimum standards and safeguards for private benefit plans in order to be "consistent with retention of the freedom of decision-making vital to pension

plans" and "in furtherance of the growth and development of the private pension system." S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4849-50. This decision-making includes the day-to-day processing and payment of benefits (*see Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2219) as well as the occasional setting of benefit levels (*see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)).

Thus, even when the fiduciary is alleged to have a conflict of interest, ERISA intended that authority to decide "claim eligibility disputes ... remain with those who formulate and administer company plans and policies." *Holland v. Burlington Industries*, 772 F.2d at 1148; *see also Jung v. FMC Corp.*, 755 F.2d at 713; *Sly v. P.R. Mallory & Co.*, 712 F.2d at 1211. Only by deferring to fiduciaries' benefits determinations can courts conform to this legislative intent.

Creation of Varying Standards of Review Under ERISA

The court of appeals' decision to require stricter judicial scrutiny of the benefits denial of a plan fiduciary when he is alleged to have a conflict of interest is also contrary to congressional intent and to established case law. Other courts have concluded that "to vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA" without any statutory basis. *Holland v. Burlington Industries*, 772 F.2d at 1148-49; *accord In re Vorpahl*, 695 F.2d at 320.

ERISA provides no support for subjecting the decisions of certain plan fiduciaries to greater judicial scrutiny based upon the identity of the fiduciary or whether the plan is funded. With certain limited exceptions not applicable here (*see* 29 U.S.C. § 1101(a)), Congress applied the same set of fiduciary standards to all benefit plans.

When Congress created a unitary set of fiduciary duties applicable to all plan fiduciaries, one of the major studies it relied upon revealed that 61% of the plans surveyed were

employer-administered. *See* Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Statistical Analysis of Major Characteristics of Private Pension Plans* 31 (Comm. Print 1972). Congress also made an explicit decision to broaden the coverage of ERISA's fiduciary duties to include unfunded plans. *Compare* S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted* in 1974 U.S. Code Cong. & Admin. News 4838, 4866 (Senate bill applied fiduciary duties only to "funds," *i.e.*, "only to those funds which leave assets at risk") *with* H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650 (House bill applied fiduciary duties to "plans," not only to "funds") *and* 29 U.S.C. § 1104(a)(1) (statute applies fiduciary duties to "plans").

Congress' adoption of a single set of fiduciary standards in ERISA is especially significant because in section 4(a), 29 U.S.C. § 1023(a), it provided that the statute would govern all plans whether established and maintained by an employer, a union, or both. On occasion Congress did vary statutory obligations. For example, ERISA spells out major differences between funded and unfunded plans and requires that certain types of plans be funded. *See id.* §§ 1081-1086. The fact that Congress invoked distinctions in some sections of ERISA but not in the fiduciary responsibility section demonstrates the clear congressional intent that they be given no significance in the latter context. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 102-03 (1820) (Marshall, C.J.).

Having imposed uniform standards on all ERISA fiduciaries, Congress plainly intended that courts defer to those upon whom they imposed these standards. Benefits determinations are within the heart of the discretion committed to ERISA fiduciaries, because these determinations require balancing the valid interests of present claimants against the valid interests of future claimants (who benefit from the denial of meritless claims). *See Elser v. I.A.M. National Pension Fund*, 684 F.2d at 656; *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984).

The incongruous result of the court of appeals' decision is to remove this discretion from certain fiduciaries and to make district courts in effect the fiduciaries of the benefit plans involved.

In support of this result, the court of appeals reasoned that courts should not defer to a fiduciary who is alleged "to have acted in his own interest and contrary to the interest of the beneficiaries." (A24) We have already noted, however, that Congress determined to permit an employer to serve as a fiduciary despite this potential conflict of interest. (*See supra* at 11) Moreover, this Court has explicitly held that beneficiaries of an unfunded benefit plan and the employer who administers that plan have a "common interest" in ensuring "the financial integrity of the plan." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 142 n.9. This common interest in defeating meritless claims of present claimants is one reason why application of the arbitrary and capricious standard continues to be appropriate even in this context. *See Holland v. Burlington Industries*, 772 F.2d at 1148-49; *Jung v. FMC Corp.*, 755 F.2d at 711-12.

Rejection of LMRA Precedent

Finally, the court of appeals erred in refusing to follow cases decided under section 302(c)(5) of the LMRA applying the arbitrary and capricious standard of review to the determinations of trustees of benefit funds. (A21) This Court has held that Congress intended to import into ERISA the substantial body of law that had been developed under the LMRA. *NLRB v. Amax Coal Co.*, 453 U.S. at 332; *see also Nedd v. UMW*, 556 F.2d 190, 206 n.31 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

Even before the adoption of ERISA in 1974, the law was well settled that the arbitrary and capricious standard applied under section 302(c)(5) of the LMRA to determine whether plan trustees had violated their fiduciary duties. *See, e.g., Lee v. Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1972); *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969); *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964

(1964).[12] Given the congressional intent to incorporate into ERISA the established law under the LMRA, it is not surprising that early ERISA cases reasoned that the arbitrary and capricious standard was also applicable under ERISA. *See, e.g., Bueneman v. Central States, Southeast & Southwest Areas Pension Fund*, 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978); *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d at 99-100 & n.3.

The court of appeals attempted to distinguish LMRA cases by suggesting that plans governed by the LMRA are protected by "elaborate requirements" in that statute (A15) that do not exist for plans governed only by ERISA (A21). This is precisely backwards. It was the absence of adequate safeguards under then existing law that prompted Congress to enact the detailed and stringent fiduciary standards of ERISA and to apply those safeguards to all benefit plans, including those covered by the LMRA. *See, e.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 4-5, 15 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4841, 4851; Staff of General Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess., *Interim Staff Report of Activities of the Pension Study Task Force* 58 (Comm. Print 1972).

Simply put, the LMRA relies upon a *procedural* device (equal representation) to guard against conflict of interest transactions, while ERISA relies upon express *substantive* prohibitions (*see* 29 U.S.C. §§ 1104-1107) to achieve the same end. The substantive constraints are surely no less effective than the procedural.[13] Indeed, where both § 302(c)(5) and

12. *Accord Wilburn v. Steamship Trade Association*, 376 F. Supp. 1228, 1239-40 (D. Md. 1974); *Patterson v. UMW Welfare & Retirement Fund of 1950*, 346 F. Supp. 11, 13 (E.D. Tenn. 1971); *Barlowe v. Roche*, 161 A.2d 58, 63 (D.C. 1960); *Judge v. Kortenhaus*, 79 N.J. Super. 574, 192 A.2d 320, 327-28 (Ch. Div. 1963); *Bono v. Kramer*, 346 Mass. 355, 191 N.E.2d 760, 764 (1963); *Occidental Life Insurance Co. v. Blume*, 65 Wash. 2d 643, 399 P.2d 76, 79 (1965).

13. Ironically, the legislative history of the LMRA demonstrates that the equal representation requirement was intended to guard against con-

ERISA governed a benefit plan, this Court relied on the latter statute to reject a claim that employer-appointed trustees were collective bargaining "representatives" of the employer within the meaning of the LMRA. It was "the fiduciary requirements of ERISA" that the Court concluded "specifically insulate[d] the trust from the employer's interest." *NLRB v. Amax Coal Co.*, 453 U.S. at 333.

Furthermore, precedent under the LMRA was not the only established law of which Congress was aware when it enacted ERISA. By 1974 it had long been settled that the determinations of trustees of employee benefit plans not governed by the LMRA, and thus not subject to an equal representation requirement, were reviewed under the arbitrary and capricious standard. *See, e.g., Reese v. Administrative Committee of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 32 Cal. Rptr. 818, 820 (1963); *Kloman v. Doctors Hospital*, 76 A.2d 782, 785 (D.C. 1950); *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E.2d 858, 863 (1965).[14] This line of authority, completely ignored by the court of appeals, decisively undermines the distinction that the court drew between those plans that are and those that are not subject to the LMRA's equal representation provision.

When Congress enacted ERISA in 1974, it acted with full knowledge of the existing common law of trusts, the law developed under the LMRA, and the common law of employee benefits. Each of those sources of law provided that the arbitrary and capricious standard governed review of trustees'

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flict of interest transactions by unions, not employers. *See NLRB v. Amax Coal Co.*, 453 U.S. at 330 n.13; *Arroyo v. United States*, 359 U.S. 419, 426 (1959).

14. *Accord Western Union Telegraph Co. v. Robertson*, 146 Ark. 406, 225 S.W. 649, 652 (1920); *Smith v. New England Telephone & Telegraph Co.*, 109 N.H. 172, 246 A.2d 697, 698 (1968); *Gitelson v. DuPont*, 17 N.Y.2d 46, 215 N.E.2d 336, 337 (1966); *Oiler v. Dayton Reliable Tool & Manufacturing Co.*, 42 Ohio App. 2d 26, 326 N.E.2d 691, 694-95 (1974); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762, 763-64 (Okla. 1955); *Garner v. Girard Trust Bank*, 442 Pa. 166, 275 A.2d 359, 361 (1971); *Neuhoff Brothers Packing Management Corp. v. Wilson*, 453 S.W.2d 472, 474 (Tex. 1970).

actions. This Court should grant review to confirm for the benefit of the increasingly uncertain lower courts that Congress meant this standard to be applied to the benefits determinations of ERISA plan fiduciaries as well.

II. THE COURT OF APPEALS' INCLUSION OF ALL FORMER EMPLOYEES AS "PARTICIPANTS" IN AN ERISA BENEFIT PLAN CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, FAILS TO GIVE MEANING TO STATUTORY LANGUAGE, AND IMPOSES IMPOSSIBLE BURDENS ON PLAN ADMINISTRATORS CONTRARY TO CONGRESSIONAL INTENT.

Many provisions of ERISA—including the right to claim damages under section 502(c), 29 U.S.C. § 1132(c), for an administrator's alleged inadequacies in responding to a request for information about a benefit plan—are applicable only to "participants" or "beneficiaries" of a benefit plan.[15] Section 3(7) of the statute, *id.* § 1002(7), defines the term "participant" to include

> any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . .

The court of appeals held that any former employee claiming benefits under a plan qualifies as a participant in the plan under this definition. (A42) This far-reaching holding

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15. A participant must be sent plan documents at specified times and intervals (29 U.S.C. § 1024(b)(1)); may examine such documents at any time at specified places (*id.* § 1024(b)(2)); must be sent financial information annually (*id.* § 1024(b)(3)); must be sent copies of plan documents on request (*id.* § 1024(b)(4)); and must be sent information as to his accrued and nonforfeitable benefits on request once a year (*id.* § 1025(a)). Additionally, a participant may bring suit in federal court to enforce his rights under ERISA under section 502(a) of the statute, *id.* § 1132(a), and may be entitled to attorneys' fees under section 502(g), *id.* § 1132(g), as well as to discretionary damages under section 502(c).

conflicts with the decisions of every other circuit that has considered the issue, with any common sense reading of the phrase "may become eligible to receive a benefit," and with congressional intent.

The court of appeals included within the term "participant" "both people who are in fact entitled to a benefit under the plan and ... those who claim to be but in fact are not." (A42) The court applied its decision to "[p]eople who worked for a company for a time, and who are not certain whether or not they are entitled to benefits" (*id.*) and to claimants whose "claim for benefits is not colorable" (A43). Thus, under the decision it is impossible to justify a plan administrator's restricting any former employee's access to benefits information—including information that must be regularly provided in perpetuity without being specifically requested.

As the court of appeals acknowledged, other circuits have adopted a different view of who qualifies as a participant. (A40-A41) Indeed, though the court did not distinguish them, the other circuits' rules vary among themselves. The Fifth Circuit has held that the "may become eligible" language was intended to apply only to current employees (*Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 228 (5th Cir. 1981)) and that former employees are participants only if their benefits have vested (*Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir. 1980)).[16] The Ninth Circuit has rejected this restrictive approach and has held that a former employee is a participant if he has either "a reasonable expectation of returning to covered employment" or a "colorable claim to vested benefits." *See Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 318 (1987); *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 303

16. Based on Fifth Circuit precedent, the Fourth Circuit has refused to adopt a broad reading of the term "participant." *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). As the court of appeals noted (A41), the Fourth Circuit also has held that an individual who was designated as a beneficiary by a plan and had claimed benefits thereunder had standing to bring suit under section 502(a) of ERISA as a "beneficiary." *Salomon v. Transamerica Accidental Life Insurance Co.*, 801 F.2d 659 (4th Cir. 1986).

(9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). The Second Circuit, whose precedent on this issue is not mentioned by the court of appeals, follows the same approach as the Ninth. *See Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473 (2d Cir. 1985).[17]

The court of appeals' holding not only squarely conflicts with these other circuits' precedents but also contravenes the language and intent of ERISA. This Court recently noted "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). The court of appeals' interpretation of ERISA's definition of the term "participant" fails to give any meaning to the phrase "may become eligible." *See Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476. Congress must have intended this phrase to exclude at least those former employees who will clearly not become eligible to receive benefits. The court of appeals, however, included within the definition all former employees—including those with no colorable claim that they will ever become entitled to benefits. (A43)

The court of appeals' expansive reading of the term "participant" also fails to take into account the concern expressed in the legislative history of ERISA that plans not be so heavily burdened by regulation that "employers respond ... by decreasing benefits under existing plans or slowing the rate of formation of new plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4682. Given ERISA's broad venue provision, the court's holding affects every benefit plan offered by a company that is incorporated, licensed to do business, or doing business or that can be found in the Third Circuit—even if the plan does not cover individuals or facilities within the Circuit. *See* 29 U.S.C. § 1132(e)(2); 28 U.S.C. § 1391(c). In order to

17. The cases cited above speak of a claim to vested benefits because they involved pension plans, which (unlike welfare plans) are subject to ERISA's vesting requirements. *See* 29 U.S.C. § 1051(1).

comply with ERISA's information disclosure provisions (*see* 29 U.S.C. § 1024(b)), the administrator of each such plan will have to send various plan documents to every former employee of the company and to respond within 30 days to written requests for plan information from any such former employee. The cost of complying with these time-consuming disclosure obligations may well "reduce the amounts available to actual beneficiaries of the plan for no statutory purpose." *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476.

The court of appeals believed that its holding served the statutory purpose of arming "individual participants and beneficiaries ... with enough information to enforce their own rights." S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863 (quoted at A43). This argument is mere bootstrapping because the quoted passage from the legislative history itself speaks of "participants" who have "rights" and not of "claimants." Moreover, as the Second Circuit has noted, this statutory purpose is adequately served by interpreting the term "participant" to include former employees with colorable claims to eligibility. *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 477.

The court of appeals' ruling was largely motivated by a belief that any individual "who claims to be" a participant or beneficiary should have standing to bring suit under section 502(a) of ERISA, 29 U.S.C. § 1132(a). (*See* A41) The Second Circuit rejected this concern out of hand, noting that "the courts are obviously free to reexamine a litigant's status under the plan." *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 477 n.5. Whether this examination goes to standing, to jurisdiction, or to the merits is beside the point.[18] The inquiry is necessary in any event. *See Freeman v. Jacques*

18. The court of appeals cited *Bell v. Hood*, 327 U.S. 678, 682 (1946), as holding that "a lack of standing should not be confused with a lack of subject matter jurisdiction." (A42) In fact, in *Bell* this Court reversed a lower court's dismissal for lack of jurisdiction, explaining that failure to state a claim goes rather to the merits.

Orthopedic & Joint Implant Surgery Medical Group, 721 F.2d 654, 656 (9th Cir. 1983).

Finally, it bears noting that the court of appeals' decision is contrary to regulations of the Department of Labor, the agency delegated by Congress to enforce ERISA and in particular to monitor compliance with the disclosure provisions. *See* 29 U.S.C. §§ 1021-1031. According to the regulations, an individual ceases being a participant when he or she becomes "ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur." 29 C.F.R. § 2510.3-3(d)(2)(i)(A). In this case, plaintiffs became ineligible to receive benefits when they could no longer be RIFed or continue to accumulate vested stock rights. This occurred when the division in which they worked was sold to another company and long before they requested information about Firestone's benefit plans.

Regulations such as these are entitled to deference by the courts. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Indeed, the other circuits that have considered ERISA's definition of the term "participant" have relied on these administrative interpretations in giving that definition a much narrower reading than did the court of appeals. *See, e.g., Kuntz v. Reese*, 785 F.2d at 1412; *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476-77; *Nugent v. Jesuit High School*, 625 F.2d at 1288 n.9. The existence of these regulations further heightens the need for this Court to grant review and to resolve the conflict over who is a participant entitled to information and other relief under ERISA.

CONCLUSION

This case presents two important and pervasive issues under ERISA as to which the circuits are in clear conflict. The failure of the court of appeals to adhere to congressional intent in its resolution of these issues and the consequent confusion that is certain to ensue among employers and plan administrators make review by this Court imperative. The Court should grant the Petition and reverse the judgment of the court below in order to restore order, uniformity, and reason to the law governing employee benefit plans.

Respectfully submitted,

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December 23, 1987

87 1054

No. ______

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,

Petitioners,

v.

RICHARD BRUCH,
ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1448

BRUCH, Richard, CHUBB, John R. and SCHADE, Albert and SCHOLLENBERGER, Richard and SMITH, Ronald R. and SMOLINSKI, Leonard A. In their individual capacities and as representatives of the class of former, salaried, non-union employees of the Firestone Plastics Division which was sold to the Hooker Chemical Division of the Occidental Petroleum Corporation,

Appellants

v.

FIRESTONE TIRE AND RUBBER COMPANY and FIRESTONE TIRE & RUBBER COMPANY RETIREMENT PLAN FOR SALARIED EMPLOYEES and FIRESTONE TIRE & RUBBER COMPANY STOCK PURCHASE AND SAVINGS PLAN,

Appellees

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 82-3286)

Argued December 19, 1986

Before: HIGGINBOTHAM, BECKER, *Circuit Judges* and DUMBAULD, *District Judge**

(Filed Aug. 31, 1987)

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

Three classes of former salaried employees of the Plastics Division of defendant Firestone Tire & Rubber Co ("Firestone") allege that the administrator of Firestone's pension and welfare plans improperly denied them various benefits allegedly due under those plans. The "rub" is that the plan administrator is

* The Honorable Edward Dumbauld, United States District Court for the Western District of Pennsylvania, sitting by designation.

Firestone itself -- which is also the sole source of funding for the plan at issue in Count I. To evaluate plaintiffs' claims we must address important questions about the scope of judicial review of decisions by pension plan administrators on plan participants' claims for benefits.

Proceeding individually, the named plantiffs also contend that the plan administrator did not respond properly to their requests for information. In Count VII of their complaint, these plaintiffs invoke the statutory remedy for that wrong provided in § 502(c) of ERISA, 29 U.S.C. § 1132(c), and ask the court to order defendants to pay each named plaintiff damages of $100 per day.

After concluding that the plan administrator's decision to deny benefits should be reviewed under the deferential arbitrary and capricious standard, the district court granted summary judgment for defendants on all of the counts now before us. We affirm that decision with respect to Counts III and V, but reverse with respect to Counts I and VII.

With regard to Count I, we hold that the decision by Firestone to deny benefits under the Termination Pay plan should be reviewed de novo by the court and that there should be deference to neither the plan administrator's nor the participants' construction of plan terminology. We accordingly remand so that the district court can decide the proper construction of the relevant plan language.

With regard to Count VII, we hold that an individual has standing to request damages pursuant to § 502(c) of ERISA even if he is no longer an employee and is not entitled to any benefits other than those he has already received when he requested information under that provision. Section 502(c) confers wide discretion on the district court, however, to determine how much the claimant should receive in damages. We

remand Count VII to permit the district court to exercise that discretion.

I. BACKGROUND FACTS AND STATEMENT OF CONTENTIONS

The three plaintiff classes consist of a total of over 500 former salaried employees of the Plastics Division of defendant Firestone Tire & Rubber Co. When Firestone sold its Plastics Division to the Occidental Petroleum Corporation on November 30, 1980, "most if not all" of the class members were offered the opportunity to continue in the positions they had occupied under Firestone. Most accepted. Firestone maintained three welfare or pension plans which are relevant for present purposes.

First, under the Termination Pay plan Firestone provided severance pay to salaried employees under certain conditions discussed in detail below. After the sale of the Plastics Division, plaintiffs requested benefits pursuant to that plan but Firestone denied them. Plaintiffs challenge that denial in Count I.

Second, under the Retirement Plan, Firestone offered defined retirement benefits if employees retired at age 65; it offered other somewhat smaller benefits if employees took early retirement, which they could do under certain limited circumstances. The Retirement Plan also offered deferred vested benefits, which were smaller than either the regular or the early retirement benefit, to employees who could not meet the conditions for either regular or early retirement but who could meet other less stringent conditions. After the sale of the Plastics Division plaintiffs sought early retirement benefits, but Firestone denied their claims and awarded only the lesser deferred vested benefit. Plaintiffs challenge this decision in Count III.

Firestone also maintained a Stock Purchase Plan, under which one class of plaintiffs had been

accumulating stock. When Firestone sold the Plastics Division some of these class members' accumulated stock rights had not vested pursuant to the Plan. In Count V, plaintiffs contend that the sale of the Plastics Division was a partial termination under ERISA, 26 U.S.C. § 411(d)(3), automatically vesting their rights under the Plan on the date of the sale.

Finally, after the sale several of the named plaintiffs wrote to Firestone to request information about their benefits under each of the above plans. Plaintiffs contend that Firestone failed to respond properly to these requests, as required by section 502 of ERISA.[1] That provision also gives participants and beneficiaries a private right of action for damages against the plan administrator if the administrator does not fulfill his § 502(c) obligations. The named plaintiffs who sought information press that right of action in Count VII.

The district court granted summary judgment for defendants on all of the above claims. The court also dismissed several other counts, but plaintiffs do not appeal these decisions.[2]

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1. ERISA section 502(c) requires employers to respond within thirty days to requests by plan participants for certain kinds of information. Specifically, § 502(c) incorporates by reference the information producing requirements set out in ERISA § 105, 29 U.S.C. § 1025. That provision requires plan administrators to tell participants and beneficiaries the total amount of their accrued benefits and "the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable." 29 U.S.C. § 1025(a)(1) and (2).

2. Count II, which alleged that a partial termination of the Retirement Plan had taken place, was withdrawn by stipulation; it later became the gravamen of another lawsuit, *Sikora v. Firestone Tire & Rubber Co.*, which has since been settled. Count IV, which sought return of employee contributions to the Retirement Plan, was also withdrawn by stipulation. Count VI, in which plaintiffs sought credit for vacation time accrued but not yet taken, remained

At the heart of the district court's opinion granting summary judgment on Counts I, III and V was the court's deference to decisions by the plan administrator. In each case the administrator based its denial of claims on a construction of plan language. The district court believed that it could not reverse the administrators' constructions of the plans' terms unless they were arbitrary and capricious, and it felt obliged to uphold the administrator's decisions given that standard of review.

At the core of the plaintiffs' challenge to the district court's decision is their contention that the district court should not have applied the arbitrary and capricious standard in this case. We now address that contention.[3]

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in the case throughout the district court proceedings. The district court granted summary judgment for Firestone on that Count, and plaintiffs have not appealed that decision.

3. Defendants argue that the propriety of the arbitrary and capricious standard was not properly challenged in the district court and therefore that the issue cannot be raised on appeal. We reject this contention for two reasons.

It is true that the plaintiffs did not argue in the district court in terms that the arbitrary and capricious standard was inappropriate. But while plaintiffs accepted the label, they did disagree with the defendants in the district court about the amount of deference which the court should accord the plan administrator's decision. We therefore think that the substance of the question of deference was sufficiently raised in the district court.

More importantly, the decision challenged in Count I is based entirely on the plan administrator's construction of a certain key term. We find ourselves unable to decide whether that construction should resolve the case -- a question which even the defendants want us to answer -- without deciding how much deference should be accorded the plan administrator's decision. We therefore must decide the proper scope of review.

II. SCOPE OF REVIEW

A. *Plaintiffs' Contentions*

Plaintiffs argue that both the common law of trusts and federal common law developed pursuant to ERISA counsel against deferring to decisions by fiduciaries with interests adverse to those of the claimants. Such a conflict can occur, for example, if the employer is the plan administrator and the plan provides that the employer's contributions in a given year are determined by the cost of satisfying plan liabilities in the prior year. Or, as in this case with respect to Count I, a conflict of interest may occur if the plan administrator is also the employer and the plan is unfunded, so that any benefits provided by the plan are paid directly by the employer out of its general corporate funds.

Plaintiffs advance two arguments to justify rejection of the arbitrary and capricious standard, and though these theories are based on different legal principles they produce essentially the same result. First, plaintiffs argue that the principles of trust law should control, that under trust law the plan adminstrator owes the employees a fiduciary duty, and that courts enforce that duty by construing all plan language "solely in the interest of the beneficiary." Plaintiffs argue further that the sole benefit standard requires courts to construe all ambiguities in plan language in favor of the beneficiaries, and in favor of coverage.

Alternatively, plaintiffs argue that contract law controls, that the welfare plan at issue in Count I is a unilateral contract drafted by defendant Firestone, and that the principles of contract law require that ambiguities be construed against the draftsman. The result under this theory is also to construe ambiguities regarding coverage in favor of the employee or former employee requesting benefits.

B. *Current Law on the Scope of Review*

The clear weight of authority under ERISA is against the plaintiffs' position. As defendants correctly note in their response to plaintiffs' argument, most courts of appeals have applied the arbitrary and capricious standard when considering challenges to plan administrators' denial of benefits. *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963); *Miles v. New York State Teamsters Conference*, 698 F.2d 593 (2d Cir. 1983); *Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), affirmed mem. as *Brooks v. Burlington Industries*, 106 S.Ct. 3267, cert. denied as *Slack v. Burlington Industries*, 106 S.Ct. 3271 (1986)[4]; *Dennard v. Richards Group, Inc.* 681 F.2d 306, 314 (5th Cir. 1982); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986) (per curiam); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985).[5]

4. A summary affirmance by the Supreme Court has precedential value, see Robert L. Stern, et al., *Supreme Court Practice* 287 (6th ed. 1986). But the petition for certiorari which the Court granted, and with respect to which it affirmed, presented only the question whether ERISA preempted state regulation of the severance plan. See 54 U.S.L.W. 3237 (1986). The summary affirmance in *Brooks* therefore does not affect the question of scope of review.

A second petition for certiorari was also filed in this case, which did ask the Court to rule on the propriety of the arbitrary and capricious standard. See *Slack v. Burlington Industries*, 54 U.S.L.W. 3470. That petition was denied, see 106 S.Ct. 3271 (1986); such a decision, of course, has no precedential weight.

5. This Court has not taken a position on this issue. We have held:

> When the amount of benefits to which a distinct group of beneficiaries is entitled [is at issue], pension trustees must necessarily strike a balance between the interests of the beneficiaries who are members of this group and beneficiaries who are not. . . . Because the trustees in these circumstances must reconcile competing interests of different beneficiaries, the trustees' choice cannot be said to violate their fiduciary duty unless it is arbitrary and capricious.

Most of these courts -- though, as we discuss below, not all -- have applied this standard without stopping to ascertain whether the plan's funding obligations gave the plan administrator an interest adverse to the claimants with respect to the question whether benefits should be paid.

The arbitrary and capricious standard has not been applied unanimously, however, or without misgivings. First, recognizing the possibility that an interested decisionmaker's bias may prejudice him against the claimant and thereby deprive the claimant of an impartial hearing, this Court has explained in detail why it refused to defer to decisions made under ERISA by such fiduciaries.

In *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), we declined to apply the arbitrary and capricious standard when reviewing a decision by plan administrators to return to the employers money which the employers had paid to fund a specified level of employee benefits. The beneficiaries alleged that if the trustees had fulfilled their duty to act "solely in the interest of the beneficiaries," ERISA § 404, 29 U.S.C. § 1104, they would have used the excess to purchase more benefits for the employees rather than returning the surplus to the employers. We held that when beneficiaries sue claiming that plan fiduciaries "have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests," reviewing courts must "apply

the strict statutory standards of ERISA" rather than "the more deferential 'arbitrary and capricious' standard." 732 F.2d at 333-34.[6]

Edwards v. Wilkes Barre Publishing Co. Pension Trust, 757 F.2d 52, 56 (3d Cir. 1985), quoted with approval in *Northeast Dep't ILGWU v. Teamsters Local No. 229*, 764 F.2d 147, 163 (3d Cir. 1985). See also *Gaines v. Amalgamated Insurance Fund*, 753 F.2d 288 (3d Cir. 1985) (applying arbitrary and capricious standard without noting whether or not plan was established pursuant to § 302, but where propriety of arbitrary and capricious standard was not challenged).

We explained in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984), however, and reiterate in this opinion, that while the arbitrary and capricious standard should be applied only when the trustee is choosing among beneficiaries: when one of the possible beneficiaries of the trustee's decisions is the trustee himself, this degree of deference is inappropriate.

6. A number of cases, both in and out of the pension context, rely on similar principles. One such case in the pension area is *Teamsters Local 115 v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3rd Cir. 1986), affirmed without opinion by an equally divided Court, 55 U.S.L.W. 4662 (1987). There we struck down one part of the arbitration provisions of the Multiemployer Pension Plan Amendments Act because it violated the due process clause of the Fifth Amendment. Pursuant to MPPAA, plan trustees -- who had a fiduciary duty to maximize the value of the plan's fund -- decided the amount owed to a Multiemployer Pension Plan by an employer withdrawing from the plan. In subsequent challenges to the trustees' decision the trustees' determination was to be presumed correct, and reversed only if the withdrawing employer could show "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. 1401(a)(3)(A). We held the statute unconstitutional because according this presumption of correctness to the decision of an interested party deprived the withdrawing employer of a fair hearing. 787 F.2d at 142.

A line of California cases relies on the same principle. In *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165 (1981) the California Supreme Court held an

Second, even some courts that apply the label "arbitrary and capricious" to describe the scope of their review in fact subject plan administrators' decisions to more rigorous review than that normally accorded under the arbitrary and capricious standard under certain circumstances, especially when the plan administrator possesses an adverse interest. A line of cases in the Ninth Circuit provides one example. In *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983) (citations omitted), the court held that if a plan provision excludes a "disproportionate number" of participants from benefits, "the burden shifts to the trustees to show a reasonable purpose for the exclusion." Similarly, in *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985), the same court construed the arbitrary and capricious standard to provide:

> Where, as here, the employer's denial of benefits to a class avoids a very considerable outlay [by the employer], the reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision.

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arbitration agreement unconscionable, and refused to enforce it, because it designated as arbitrator a member and former official of the labor union of which one of the parties was a member. This principle, however, was not offended in *Dryer v. Los Angeles Rams*, 40 Cal.3d 406, 220 Cal. Rptr. 807, 709 P.2d 826 (1985), because the panel which served as arbitrator was composed of two members representing one side and two representing the other. See also *In re Cross & Brown Co.*, 167 N.Y.S.2d 573 (App. Div. 1957), which declined to enforce an arbitration agreement between a real estate broker and his employer because it appointed the employer's Board of Directors as arbitrator. The court held that such an agreement contravenes the "well-recognized principle of 'natural justice'" that "a man may not be a judge in his own cause." Id. at 575.

Finally, in *Dockray v. Phelps Dodge Corp., 801 F.2d 1149*, (9th Cir. 1986) the court defined the standard of review with great care, shaping it in response to "the countervailing tugs of divided loyalty pulling" at the plan administrator.

> At the time that Administrator/Employee Benefits' Director McGowan denied Dockray's pension application [a] strike [against the employer] had entered its third month. The strike had been unusally bitter and violent. The Governor of Arizona had sent National Guardsmen to protect replacement workers as they crossed the lines of massed pickets outside the mine gates. Scuffles, property damage, vigilante violence, and numerous arrests had attracted national media attention to the dispute. For Dockray to "win" his pension would no doubt have boosted the strikers' morale at a time when Phelps Dodge had apparently succeeded in overcoming the picketing and had fully staffed the mine with replacement workers. Given this highly charged atmosphere, we think it unrealistic to grant the same substantial deference to the consideration of Dockray's application by an administrator who is also a senior member of Phelps Dodge management as we would to the decision of a wholly independent fund trustee in similar circumstances.
>
> On remand, the burden of persuasion, of course, remains with Dockray. To prevail, Dockray must show that the Administrator breached his statutory fiduciary duty to act "for the sole and exclusive benefit" of the fund's beneficiaries, including Dockray. 29 U.S.C. § 186(c)(5). The court will weigh the Adminstrator's rebuttal of Dockray's evidence of bias against the arbitrary

> and capricious standard. However, the district court should be appreciably more critical of the reasons advanced by the Administrator, and less willing to resolve all ambiguities in the Administrator's favor, than the court would be if the fund were administered by an independent trustee.

801 F.2d at 1152-53 (footnote omitted).

Similarly, in *Dennard v. Richards Group, Inc.* 681 F.2d 306, 314 (5th Cir. 1982) the Fifth Circuit held that whether a plan administrator's interpretation of a term is arbitrary and capricious turns, inter alia, on the "legally correct" meaning of the term. The Fifth Circuit also emphasized that the facts of a particular case should influence the district court reviewing a plan administrator's decision. On remand, therefore, the district court was instructed to consider the "factual background of the determination by a plan and inferences of lack of good faith, if any." 681 F.2d at 314.

We believe that these cases reflect significant dissatisfaction with the arbitrary and capricious standard when the employer can profit from its decision to deny benefits. We also believe, however, that the propriety of the standard depends on the context in which it is used. In particular, we think it important to distinguish between the standard's use under some ERISA plans and its use in review of decisions made by trustees of plans established pursuant to § 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). We can explain this distinction best by tracing the development of the arbitrary and capricious standard. As the discussion in Part I C shows, the standard reached ERISA after it was adopted from the common law of trusts by courts construing the LMRA. The safeguards present in the

LMRA distinguish that context from many administrative decisions made under ERISA and indicate that the standard should apply in only some ERISA contexts.

C. *The Origin of the Arbitrary and Capricious Standard*

The arbitrary and capricious standard governs judicial review of plan adminstrators' decisions in pension plans set up under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), see e.g., *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3d Cir. 1984), and courts appear to have imported the standard into ERISA by analogy to cases concerning LMRA plans. As we explained in *Struble*, 732 F.2d at 333:

> The "arbitrary and capricious" standard derives from section 302(c)(5) of the LMRA. That section imposes a duty of loyalty on section 302 trustees by permitting employer contributions to a welfare trust fund only if the contributions are used "for the sole and exclusive benefit of the employees. . . . " Section 1104 of ERISA imposes a similar duty of loyalty, and not surprisingly the courts have applied the "arbitrary and capricious" standard under ERISA as well.

See, e.g., *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413 (9th Cir. 1983). The LMRA cases, in turn, borrowed principles from the common law of trusts -- a body of law which also formed the basis for ERISA itself. We therefore begin our analysis with a brief review of the relevant trust law doctrines.

The paradigmatic common law trustee must act solely for the benefit of the beneficiaries. Restatement (Second) of Trusts § 170. If the settlor of the trust

instructs that the trust assets be distributed among the beneficiaries, without prescribing the method for doing so, he perforce relies on the trustee's discretion to determine how the allocation should be made. Courts therefore respect the allocation decision unless it constitutes an abuse of discretion. See id. § 187, which provides:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

Comment (g) to Restatement § 187 explains, however, that courts will not defer to a trustee's judgment when a conflict of interest threatens the trustee's impartiality:

> *g. Improper motive.* The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive. . . . In the determination of the question whether the trustee in the exercise of power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.

Building on these trust law principles, the Labor Management Relations Act created a framework within which employers could set up pension plans for their unionized employees. Under § 302(c)(5) of the LMRA, however, "employees and employers [must be] equally represented in the administration of [the pension or welfare] fund." The LMRA sets out elaborate requirements intended to protect the plans it authorizes from control by a party biased toward either the employees or employer.[7]

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7. Section 302(c)(5)(B) provides as follows:

in the event the employer and employee groups deadlock on

The arbitrary and capricious standard was first used under LMRA plans in a line of cases in the district court for the District of Columbia (and subsequently approved by the D.C. Circuit). These cases have two themes.

First, the courts discussed the impartiality of the LMRA decisionmakers, and they relied on that impartiality in settling on the arbitrary and capricious standard. Second, the cases also attempted to determine whether an employee's interest in his pension benefits was contractual or equitable. If the former, these first courts believed, then judicial review of an administrator's decision would be de novo, as would a court's review of a standard breach of contract claim. If the interest was equitable, however -- as is a beneficiary's interest in his right to receive benefits pursuant to a trust -- then the court would be more deferential.

Both of these themes reappear in the current debate about the appropriate scope of review under ERISA. It will therefore be helpful to review these early cases in some detail.

The first court to address these questions was *Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1948), decided approximately a year after the passage of the LMRA. There the employer Trustee of a § 302 plan challenged the Trustees' decision to set benefits at a particular level. The district court noted that the LMRA divided

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the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement [must] provide[] that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office.

power equally between employer and employee representatives, holding that the plan "specifically gives each Trustee equal power both in the establishment of the Fund and its administration." For this reason and because the plan was "a benefical Fund, and the rules applicable to charitable trusts undoubtedly apply," the court held that "the majority of the Trustees have a right to act" so long as their decision is not "improper, unbusinesslike, or not in accordance . . . with the letter and the spirit of the Labor Management Relations Act." Id. at 544.

In *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958), the de novo approach surfaced for the first time. There the court reviewed a plan administrator's denial of benefits. The Pension Plan relied on *Van Horn* to contend that "the Fund is a charitable trust" and therefore "that the court cannot interfere in its decisions unless the Trustees act arbitrarily or unreasonably." The district court rejected that contention, however, holding:

> In the first place, I do not agree that this Fund is a charitable trust, involving mere gratuities, but am of the opinion that money paid from [the plan] is in the nature of a fringe benefit, a term of recent origin, or deferred, contingent compensation which the employees of signatories may be entitled to receive in addition to their wages, and which was procured for them by their bargaining agent, the United Mine Workers of America. . . . An employee therefore has a contractual right to this pension if and when he comes within the regulations prescribed by the Trustees.

159 F. Supp. at 286. The Trustees also pointed to a term in the Trust agreement "which grants them full authority in respect of coverage, eligibility, amounts of

benefits, etc." Id. The district court construed this clause to grant the Trustees

> the right to set up requirements for eligibility, etc., which they have done . . . and to pass upon applications for pension when made and determine whether they come within the requirements. However, I do not believe it comprehends the deprivation of an applicant's right of recourse to the Courts when he disagrees with the determination of the Trustees on this point, regardless of whether they acted arbitrarily or unreasonably.

Id.

The debate continued in *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958). There the trustees pointed to language in the plan document making them responsible for the decision whether to grant or deny benefits, and they contended that this language committed the benefits decision entirely to their discretion, so that there could be no judicial review at all. The district court disagreed, holding

> This Court is of the opinion that despite the contractual provisions in the trust instrument giving absolute discretion to determine eligibility to the fund, judicial review does lie where applicants can show a breach of fiduciary trust, fraud or arbitrary action.

166 F. Supp. at 349 (footnotes omitted).[8]

8. In so holding the district court applied the principle articulated in § 187 of the Restatement (Second) of Trusts:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

See text above, typescript at 16.

Judge Holtzoff, writing in 1960 in *Kennet v. United Mineworkers of America*, 183 F. Supp. 315 (D.D.C. 1960) still found the question vexing. He began his answer by noting that the LMRA "authorized the establishment of welfare funds by employers for the sole and exclusive benefit of the employees of the employer and their families and dependents," and that "[t]he statute further provided . . . that the employees and employers were to be equally represented in the administration of th[e] fund." Id. at 316. He then presented the trust law reasoning relied upon by *Ruth v. Lewis*:

> In effect, we are confronted with a trust fund governed by three trustees and a large groups of beneficiaries of the trust fund. One of the principal branches of equity jurisprudence has traditionally been the protection of the rights of beneficiaries of trust funds. A beneficiary of a trust fund is entitled and has always been entitled to have recourse to a court of equity to secure the proper performance of the duties of the trustees and his rights in the fund. Consequently, on this ground alone the Court would have the power to determine the plaintiff's legal rights in the fund and the correctness of the action of the trustees in denying him a pension.

183 F. Supp. at 317.

Judge Holtzoff then set out the contractual approach to the problem before him, which is much akin to the argument made before us by the plaintiffs here:

> There is another approach to this problem. Contrary to the argument of defendant's counsel, the payments made from the fund are not gifts or gratuities. The employer, in making payments into

> the fund, is not making a gift. This fund was established pursuant to a contract between the union and the employers governing the terms of employment. Payments into the fund are part of the compensation received by the employee over and above his weekly wages. The services rendered by him are the consideration for both his wages and his pension. . . . The employee may be regarded as a third party beneficiary to a contract. . . .
>
> The Court concludes, therefore, that recourse to judicial action may be had to enforce rights under this fund and in such an action the Court will review the legal rights of the plaintiff and determine whether any erroneous decision has been reached by the trustees on questions of law. It will also review, to a limited extent, decisions of the trustees on questions of fact; certainly whether there is any substantial evidence sustaining the decision on questions of fact. . . . Finally, and it is not denied that this may be done, the Court will review the question of whether the action of the trustees is in any way arbitrary or capricious.

Id. at 317-18.

In reliance on this line of cases the District of Columbia Circuit settled on the arbitrary and capricious standard for review of decisions by plan administrators in § 302(c) plans. See *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963). This circuit subsequently did likewise. See *Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969).

D. *Application of the LMRA Rule Under ERISA*

The first ERISA cases to invoke the arbitrary and capricious standard did so without any discussion of

the differences between the LMRA and ERISA contexts. See, e.g., *Bayles v. Central States Pension Fund*, 602 F.2d 97, 99-100 and n.3 (5th Cir. 1979); *Bueneman v. Central States Pension Fund*, 572 F.2d 1208 (8th Cir. 1978). So have most subsequent cases. We believe, however, that in applying the common law of trusts under ERISA courts must be cognizant of the features that distinguish the ERISA arrangements from the paradigmatic common law situation. Both ERISA and the LMRA permit the trust form to be used by employers for the benefit of their employees even though -- since they deal with each other at arms' length, like buyers and sellers of any other commodity -- there will sometimes be conflicts of interest between those two groups. This difference does not prevent the trust form from being used, but it does require that trust principles not be applied mechanically in the new context.

In their oversight of a trust where the impartiality of the trustee had been carefully assured, the LMRA courts could easily adopt the principle of trust law applicable with respect to judicial review of an impartial trustee's execution of his duties. At least one court has done so in explicit reliance on § 187 of the Restatement of Trusts. See *Brune v. Morse*, 475 F.2d 858, 860 n.2 (8th Cir. 1973). Because the LMRA's precautions assure that the plan administrator will be neutral, it is easy to understand why the courts adopted this rule for judicial review of decisions made in the administration of an LMRA plan.

In the unfunded pension plan at issue in Count I of the complaint in this case, however, there is no assurance of the trustee's impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the

employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket. As we have already seen, the principle articulated in § 187 does not govern judicial review of such a trustee's decisions.

Two rationales are most frequently advanced to justify deference even in this context to fiduciaries' decisions. The first is that they have more expertise than judges in the management of pension plans; the implication is that the fiduciary whose decision is deferred to is more likely than the judge to have answered correctly the question about the meaning of the plan's term. See *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985) (preferring the decision of plan admininstrators, "whose experience is daily and continual, [over that of] judges whose exposure is episodic and occasional;" see also *Ponce v. Construction Laborers Penion Trust*, 628 F.2d 537, 542 (9th Cir. 1980) ("trustees are knowledgeable of the details of a trust fund (both its purpose and its operation), and thus they are in a position to make prudent judgments concerning participant eligibility.)"

We reject this rationale for two reasons. First, in the context of claims for benefits, the questions which courts must address do not usually turn on information or experience which expertise as a claims administrator is likely to produce. As in this case, the validity of the claim is likely to turn on a question of law or of contract interpretation. Courts have no reason to defer to private parties to obtain answers to these kinds of questions.[9] Secondly, as we have explained, there is a significant danger that the plan

9. This is to be contrasted with, for example, a decision about how to invest plan funds. Deference in that context is entirely

administrator will not be impartial. The lack of impartiality offsets any remaining benefit which the administrators' expertise might be thought to produce.[10]

Another rationale for deference is also commonly advanced -- that courts should not interfere in the trustees' decision to aid one group of beneficiaries at the expense of another. We agree that deference to that kind of decision is entirely appropriate. *Struble*, 732 F.2d at 333 (upholding use of arbitrary and capricious standard where issue is "whether the trustees have correctly balanced the interests of present claimants against the interests of future claimants"). The same degree of deference should be accorded to investment decisions made by plan administrators, so long as a conflict of interest is not alleged.[11] As we explained in

appropriate so long as the fiduciary makes no investment in the employer's business or commits some other, similar abuse.

It should be noted that we also do not deal here with a determination of fact by a plan administrator. We leave for another day the definition of the context, if any, in which courts should defer to such a determinations.

10. It has also been argued that deferring to the administrator's decision will make proceedings faster. We acknowledge that But because the speed is attained by sacrificing the impartiality of the decisionmaker, we think that it comes at too great a cost.

11. Our decision today is also not meant to address the scope of judicial review accorded a plan administrator's decision to change the terms a plan, by offering different or fewer benefits. See *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986). An employer's freedom to alter the terms on which it offers employee compensation may well be broader than its discretion to construe those terms while they remain unchanged -- and after they have induced reliance, as the terms of employment normally will.

Struble, however, and as the discussion of the common law principles also makes clear, deference is inappropriate to the extent that the party who is alleged to have benefited from the challenged decision is not a beneficiary. Id. at 333-34 (arbitrary and capricious standard should not be applied where issue is whether "they have sacrificed valid interests to advance the interests of nonbeneficiaries" and noting that the employer is not a beneficiary). Here, of course, the employer -- who also made the decision -- is the party who benefited from the denial of benefits.

Even the cases from other circuits adopting the arbitrary and capricious standard have allowed plaintiffs to show that the plan administrator was influenced by some special kind of improper motive, though they begin with the presumption that the plan administrator was impartial. In light of the incentives facing employers we think that both common sense and the principles of trust law require rejection of that presumption.

E. *The Standard to be Applied Here*

The principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of the beneficiaries, his decisions are to be scrutinized with the greatest possible care. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty" which governs a trustee in the execution of his fiduciary duty. *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). *Struble* applied this standard to review a decision about how to use surplus plan assets.

This rule would suggest that any ambiguity in the trust document should be resolved in favor of the beneficiaries, and that is the result for which plaintiffs contend here. Application of this rule would produce

exactly the opposite result from the one defendants contend for: under the arbitrary and capricious standard, a trustee's interpretation of the Plan's provisions stands unless it is unreasonable; as noted, under the plaintiffs' theory, the claimant's interpretation wins so long as it meets the same low standard.

We reject the plaintiffs' rule for reasons similar to the ones that led us to reject defendants': plaintiffs, like defendants, mischaracterize the incentives motivating the parties. For example, with respect to Count I, the trustee (Firestone) is clearly not disinterested in the amount of severance pay awarded; its impartiality therefore cannot be relied upon to produce a fair result. But whether the trustee can be a reliable decisionmaker is an entirely separate question from whether -- assuming an impartial adjudicator -- the plan document should be construed in favor of the employer or the employees.

The trust at issue here provides severance benefits, which are a form of wages. The benefits were offered as an inducement to the plaintiffs, to persuade them to work for Firestone. See *Kennet v. United Mineworkers*, 183 F. Supp. at 317. See also *Inland Steel Co. v. N.L.R.B.*, 170 F.2d 247, 253 (7th Cir. 1948), holding that "pension thus promised would appear to be as much a part of [the workman's] 'wages' as the money paid him at the time of the rendition of his services." In construing the agreement which embodies this aspect of the parties' bargain -- the Termination Pay Plan -- we therefore think it best to take as our starting point the principles governing construction of contracts between parties bargaining at arms' length. These principles counsel a construction of the trust document steering a middle course between the constructions of the document now offered by plaintiffs and defendants. In light of the

arms' length relationship between employer and employee, that seems most fitting here. Thus the industry practice with respect to severance pay plans would shed light on this plan's meaning, as would past practice under the plan itself. We apply and elaborate on this contract construction standard in the following discussion.

III. THE MERITS OF COUNT I (TERMINATION PAY)

As part of its compensation package for salaried employees Firestone's Handbook for Salaried Employees stated:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.
>
> The amount of termination pay you will receive will depend on your period of credited company service.

App. 283. The parties agree that under ERISA this statement creates -- and constitutes -- a Termination Pay Plan, which is an unfunded "Welfare Plan" as ERISA defines that term. See 29 U.S.C. § 1002(1). Because the statement has that significance, Firestone concedes that its Termination Pay plan was subject to the reporting and disclosure obligations governing all Welfare Plans. See 29 U.S.C. § § 1021 - 1031. The parties also agree that Firestone did not comply with these obligations, though they disagree about the significance of that dereliction.

Plaintiffs requested termination pay pursuant to the Termination Pay plan, arguing that the sale of the Plastics Division constituted a "reduction in force" within the meaning of the plan. In its capacity as Plan

administrator Firestone denied this request. Firestone believed that the sale of the Plastics Division did not constitute a "reduction in force" within the meaning of that term as it is used in the Termination Pay plan. In support of their contention plaintiffs rely on a line of cases holding that severance pay is due whenever an employee ceases to work for the employer (without having been fired for cause), even if the employer has sold the operation in which the employee worked and the operation's new owner has offered to retain the employee in his job. One rationale behind these cases is that salary and benefits may well be lower under the new employer, and that severance pay is intended to compensate the employee for these losses -- not merely to compensate for losses incurred as a result of unemployment. See *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App.3d 192, 107 Cal. Rptr. 111 (1st Dist. 1973); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 237 A.2d 360, 363 (1967); *Dahl v. Brunswick Corp.*, 227 Md. 471, 356 A.2d 221 (1976); *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956); *Adams v. Jersey Central Power & Light Co.*, 21 N.J. 8, 120 A.2d 737 (1956).

The district court granted summary judgment for defendants on this Count. It held that Firestone did not act arbitrarily or capriciously in construing the term "reduction in force" to exclude a sale in which the purchaser offers continued employment. Like the defendant, the district court adopted another line of cases allowing employers to refuse to provide severance pay when the employer sells the operation and the new owner offers all employees the opportunity to work for him. See, e.g., *Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), affirmed mem., 106 S.Ct.

3267, cert. denied, 106 S.Ct. 3271 (1986)[12]; *Pabst Brewing Co. v. Anger*, 784 F.2d 338 (8th Cir. 1986) (per curiam); *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985). A number of cases reach this result in construing the very Termination Pay plan at issue here. See *Adcock v. Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), affirmed in relevant part, Nos. 85-6031 and 85-6067 (6th Cir. June 26, 1987); *Davidson v. Firestone Tire & Rubber Co.*, No. 84-1215 (W.D. Tenn. May 30, 1986); *Sisk v. Firestone Tire & Rubber Co.*, No. 83-CV-1448-DT (E.D. Mich. Sept. 19, 1986).

These cases rely on the arbitrary and capricious standard, so their holding is limited to the proposition that an employer does not act unreasonably if it denies severance pay when the former employees remain employed; such a holding does not necessarily mean that severance pay can be due only when employees are unemployed. The cases suggest, however, that severance pay is intended only to compensate employees for losses they incur because they have no job. See, e.g., *Holland*, 772 F.2d at 1149 ("Burlington presented evidence that the plan was primarily intended for employees who suffered a period of unemployment when they were involuntarily terminated from their jobs").

Because the district court applied the wrong scope of review, and because application of that (arbitrary and capricious) standard was outcome determinative, we must reverse the summary judgment on Count I and remand for further proceedings consistent with this opinion. We suggest several principles of contractual construction which we believe will be relevant in the proceedings to come. We begin with several rules of interpretation which aid courts in

12. See note 4 above.

identifying the intention of parties to a contract.

Some of the cases cited above suggest that there is a practice of paying severance pay whenever employees leave an employer, regardless of whether or not the employees are actually without a job for a time. At the same time, the defendants have cited cases showing that many employers do not pay severance pay unless the employees are in fact without a job. We have no way of telling which -- if either -- of these cases represents current practice. The district court should attempt to answer that question on remand. See Restatement (Second) of Contracts § 202(5) (instructing that "the manifestations of intention of the parties to a promise or agreement are interpreted as consistent . . . with any relevant . . . usage of trade").

Similarly, the defendants have argued that their own practice with respect to the Firestone Termination Pay plan is that benefits are paid only if employees are without any job when they cease work for Firestone. Plaintiffs have contested this version of Firestone's past practice. In determining the plan's meaning the district court should take account of such evidence of past practice under the plan. See Restatement (Second) of Contracts § 202(4).[13]

Additionally, plaintiffs have pointed to language in a Firestone memorandum which they claim supports their contention that a reduction in force includes any separation of an employee from Firestone regardless of whether or not the employee has another job. This evidence, if credited and if construed as plaintiffs

13. That section provides:

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

invite the court to construe it, would also support the result for which they contend. See Restatement § 202(5) ("[w]herever reasonable, manifestations of the parties to a promise or agreement are interpreted as consistent with each other").

The district court may also find that, under the common usage in the trade, or under Firestone's past practice, Termination Pay is awarded even if employees remain employed if their compensation drops substantially when the employees cease to work for the employer. Here the parties disagree about whether or not the plaintiffs' compensation after the sale of the Plastics Division is as great as it was before -- particularly with respect to benefits, such as the provision of Termination Pay. If the district court determines that the award of Termination Pay turns on the difference in the employees' compensation before and after the sale, it should ascertain the scope of any such difference in rate of pay.

It may be, however, that while these canons of construction prove helpful, they do not resolve the case by themselves. That is in part because this is a unilateral contract, and it may be that the parties here simply never agreed on what the term "reduction in force" would mean; if that is so then rules of interpretation designed to help courts identify that intention will not be helpful. The problem facing the district court on remand would then be akin to the difficulties a court faces when parties omit an essential term. The Restatement instructs that in that circumstance "a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204. If the parties here did not agree on what would constitute a "reduction in force," so that the court cannot enforce their intention, then the court should adopt the most reasonable

understanding of the term.[14]

IV. SCOPE OF REVIEW AND COUNTS III AND V

We must also discuss the issue of scope of review in connection with Counts III and V. In Count III plaintiffs have alleged that certain representations in the Employee Handbook about the Early Retirement Plan estop Firestone from denying plaintiffs Early Retirement benefits and awarding them "deferred vested benefits" instead. In Count V plaintiffs contend that the sale of the Plastics Division constituted an early termination of the Stock Ownership Plan as described in ERISA, 29 U.S.C. § 411 (d)(3), which in turn caused otherwise unvested rights in that plan to vest on the date of sale.

The district court held that defendants were not equitably estopped from denying plaintiffs Early Retirement benefits, and that there was no partial termination. But the arbitrary and capricious standard was not entirely absent from this part of the district court's opinion. The plaintiffs argued that the plan description led them to reasonably expect benefits, and that our holding in *Northeast Dep't ILGWU v. Teamsters Local 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) therefore compelled the award of those benefits. The district court held that

> plaintiffs' theory is inconsistent with the standard of review under which I must approach this case, i.e. the arbitrary and capricious standard. *Northeast Dept. ILGWU*, 764 F.2d at 163. Defendants' decision must be sustained unless

14. Even in this eventuality, however, the court will be helped in identifying the most reasonable term by the information discussed above relating to the parties' and the industry's past practice and to Firestone's other statements regarding the term's meaning.

that decision was arbitrary and capricious. I cannot defer to plaintiffs' interpretation although it is one factor to be considered.

Slip op. at 26.

The arbitrary and capricious standard also appears in the parties' arguments under Count V, having to do with an asserted partial termination of the plan, and in the district court's decision on that count. Plaintiffs argued that defendants were obliged to address the question whether there had been a partial termination; the defendants' failure to address that question, the plaintiffs argued, made the denial of benefits arbitrary and capricious. The district court held that the defendant's action was not arbitrary and capricious, and therefore that it was permissible under ERISA.

Because of the nature of the challenges advanced in Counts III and V, we believe that the question of deference to the administrator's decision has no place in the court's discussion of the claims advanced in those parts of the complaint. The standard of conduct governing the fiduciary is that his conduct not be "arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or *erroneous on a question of law.*" *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977) (emphasis added). Whether or nor Firestone is equitably estopped from denying benefits is, for present purposes, a question of law. So is the question whether or not there was a partial termination.

Put another way, trustees only have discretion to decide those matters expressly delegated to them by the trust instrument. Comment *a* to Restatement of Trusts (Second) § 187 (emphasis added), which sets out the arbitrary and capricious standard, provides:

The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust *or by the principles of law applicable to the duties of trustees.*

While the decision to grant or deny benefits may be committed to the trustee's discretion by a trust, the question whether there has been a partial termination, or whether or not the plan is equitably estopped from denying a claim, are never committed to the trustee at all. Those questions are governed by "the principles of law applicable to the duties of trustees." When posed to a court the court must answer them de novo. See *Rosen v. Hotel and Restaurant Employees*, 637 F.2d 592, 597 (3d Cir. 1981) (ignoring arbitrary and capricious scope of review and determining equitable estoppel claim on the merits, without any deference to plan administrator).

V. THE MERITS OF COUNT III (EARLY RETIREMENT BENEFITS)

At issue in Count III is the distinction between Early Retirement and Deferred Vested benefits. Three kinds of benefits are relevant for purposes of this Count.

The Retirement Plan provided that employees could retire with regular Retirement benefits at age 65. However, employees could also retire before age 65 if they had ten years of service, or if they were at least 55 years old and had thirty years of service. The Early Retirement benefit they would then receive would be equal to the Regular Retirement benefit minus .4% for each month by which the employee's age was less than 62, and .2% for each month by which the employee's age was less than 50.

Finally, an employee who was eligible for neither

Regular or Early Retirement benefits could still receive deferred vested benefits, so long as he had ten years of service with Firestone. The deferred vested benefit was smaller than the Early Retirement benefit, and was equal to the actuarial equivalent of the amount the employee would have received had he taken regular retirement at his last rate of pay.[15]

Predicating their claim on the theory of equitable estoppel, the plaintiffs argue in Count III that they are entitled to Early Retirement benefits, which Firestone refused to award plaintiffs, instead of the deferred vested benefit, which plaintiffs actually received. Plaintiffs argue that the plan misled them into believing that they would received the Early Retirement benefit and that they are therefore entitled to receive it.

The district court correctly summarized the requisites of an equitable estoppel claim: there must be a material misrepresentation or omission, reasonable reliance thereon, and damage. See *Rosen*, 637 F.2d at 597; *Consolidated Express v. New York Shipping Ass'n*, 602 F.2d 494, 510 (3d Cir. 1979); see also Restatement (Second) of Contracts § 90 comment *a* ("Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation"). We agree with the district court that there has been no misrepresentation here, because the plan summary was sufficiently clear about the distinction between the early retirement benefit and the deferred vested benefit.

15. The deferred vested benefit is paid over more years than the regular retirement benefit, because the employee begins receiving the former before he turns 65, when the latter begins. The actuarial equivalent of the regular pension benefit is an amount which reflects this fact, reducing the amount paid each month so that the present value of the total income stream is equal to the present value of the income stream produced by the regular pension benefit.

The employee handbook gives an example of how the early retirement benefit is computed, explaining that a 55 year old employee who elected to receive the early retirement benefit would receive 66.4% of the amount he would have received had he taken regular retirement.[16] The handbook gives no examples of how to compute a deferred vested benefit, nor does it define the term "actuarial equivalent."

Several named plaintiffs testified in deposition that they expected to receive Early Retirement benefits when Firestone sold the Plastics Division. (Although they did not identify by name the benefit to which they thought they were entitled, these employees testified that they expected to receive 66.4% of the amount they would have received had they taken regular retirement. The precision of the employees' recollection as to the fraction of their regular retirement benefits represented by the benefit they expected makes clear that they were thinking of the early retirement benefit.)

While the named plaintiffs' testimony would certainly justify a finding that the plaintiffs did not understand how their benefits program worked, however, this evidence does not identify any factual misrepresentation in the handbook. The handbook correctly sets out the eligibility requirements for both the deferred vested and early retirement benefits. Indeed, the plaintiffs point to no statement in the handbook which they claim is false. The only fault

16. This number was computed as follows:

The early retirement benefit is equal to the regular retirement benefit reduced by .4% for each month by which the employee's age is less than 62. A 55 year old employee is 84 months younger than 62, so his retirement benefit would be reduced as follows:

$$84 \times .4\% = 33.6\%$$

$$100\% - 33.6\% = 66.4\%.$$

plaintiffs can identify with the handbook is that while it gave examples of what the early retirement benefit would be for employees retiring at various ages, it gave no such examples for the deferred vested benefit. That is obviously not a misrepresentation, and it is not the omission of a fact: it is only the omission of what might have been a helpful explanation.

Finding no misrepresentation or omission, we need not investigate the merits of the other elements of an equitable estoppel claim.[17] The district court's grant of summary judgment for Firestone on Count III will be affirmed.

IV. THE MERITS OF COUNT V (THE STOCK OWNERSHIP CLAIM)

In Count V plaintiffs contend that Firestone's sale of its Plastics Division constituted a partial termination of the Stock Ownership Plan within the meaning of ERISA, 26 U.S.C. § 411(d)(3).

The district court concluded that there was no partial termination because the Plastics Division's sale affected only a very small fraction of the total number of employees covered by the Stock Ownership Plan. In so holding the district court relied on a line of cases and I.R.S. Revenue Rulings which define a partial termination in terms of the percentage of employees in the plan who were affected by the corporation's transaction. See *Babb v. Olney Paint Co.*, 764 F.2d

17. Plaintiffs make some suggestion in their briefs that we should judge misrepresentations particularly strictly in the ERISA context because of the employer's statutory obligation to write the plan "in a manner calculated to be understood by the average plan participant." ERISA § 102, 29 U.S.C. § 1022. Plaintiffs do not articulate this argument clearly, however, and the plaintiffs apparently did not raise it before the district court. We accordingly do not address it.

240 (4th Cir. 1985); *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113 (D. Kan. 1984); *Wishner v. St. Luke's Hospital Center*, 550 F. Supp. 1016, 1019 (S.D.N.Y. 1982); Rev. Rul. 81-27, 1981-1 C.B. 228; Rev. Rul. 73-284, 1973-2 C.B. 139; Rev. Rul. 72-439, 1972-2 C.B. 223. Under each of these authorities, the facts of this case would not constitute a partial termination, because only 2.2% of the employees covered by the plan were terminated. See *Babb*, 764 F.2d at 243 (12.84% not enough to constitute partial termination); *Ehm*, 583 F. Supp. at 1116 (2.5% not sufficient); *Wishner*, 550 F. Supp. at 1019 (3.7% not sufficient).

Plaintiffs argue, however, that these cases are either inapposite or wrongly decided, and that the Revenue Rulings are not dispositive on the question whether a partial termination has occurred for ERISA purposes. Our decision in *United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983) supports the latter proposition, for we held there that facts constituting a partial termination for tax purposes will not necessarily constitute such a termination for ERISA purposes. We decided in *Harris* that Pension Benefit Guaranty Corporation insurance, which ERISA makes available only on partial termination, might in fact have been available to the plaintiff steelworkers even though the employer had not engaged in a tax code partial termination.

Plaintiffs argue further that whether a partial termination has occurred for present purposes should turn on the total number of employees affected, or the amount of money the employer saves by terminating the affected employees. In support of this proposition they cite *Weil v. Terson Co. Retirement Plan*, 750 F.2d 10 (2d Cir. 1984), in which the Second Circuit held that a partial termination for ERISA purposes should be identified on the basis of "the number of employee

terminations made in connection with" the transaction said to constitute the partial termination. Id. at 12.

We reject the plaintiffs' contention, and disagree with the approach taken by the Second Circuit in *Weil*. Section 411(d)(3) provides in pertinent part that

> a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that--
>
> > (A) upon its termination or partial termination . . .
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

This provision is intended to prevent employers from maintaining pension plans for the purpose of deferring income, and thereby reducing their taxes, rather than for the purpose of providing retirement benefits for employees. The penalty for violation of this section -- i.e. for maintenance of a plan that does not provide for full vesting on partial termination -- is loss of § 401 qualification -- a very severe penalty. As a result of this provision, all qualifying pension plans contain the assurances required by this section. Plaintiffs can then sue on the basis of the plan language, as they have done here.

We believe that the structure of the statute suggests that a partial termination should be found under § 411(d)(3) only if so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to

employees. That formulation suggests that the district court was correct in focusing on the percentage of employees in the plan who were affected by the transaction said to constitute a partial termination. Because that fraction was so low in this case -- approximately 2% -- the district court was also correct in holding that the sale of the Plastics Division did not constitute a partial termination.

We note that the plaintiffs' argument is essentially driven by the theory that the partial termination provision was designed to protect employees from dismissals motivated by an employer's desire to avoid paying pension benefits. That desire was indeed a very important goal of ERISA. But Congress pursued that goal in other sections of ERISA, by providing detailed mandatory vesting schedules, and such requirements are a much more precise way of solving the problem of strategically motivated dismissal. Attributing this goal to the partial termination provisions as well makes the partial termination provision seem both superfluous and clumsy. This consideration also supports the result we reach.

We note, however, that it is not easy to divine the purpose of § 411(d)(3). Without a clear sense of the provision's purpose it is difficult to decide what should and should not constitute a partial termination. Clarification from Congress or the Internal Revenue Service as to the purpose of this provision would make it substantially easier to enforce.

VI. THE MERITS OF COUNT VII (REQUEST FOR INFORMATION)

In the last Count before us on appeal three of the named plaintiffs sue individually, alleging that the plan administrator failed to respond properly to their requests for information made pursuant to § 502(c) of ERISA, 29 U.S.C. § 1132(c). That section provides:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal.

The district court held that these plaintiffs were not entitled to relief under this provision because they had made their requests for information after they ceased to be Firestone employees. The district court held that, because they were no longer Firestone employees and because -- as it had concluded earlier in the same opinion -- they were not entitled to any benefits from any of the plans, the named plaintiffs were not "participants or beneficiaries" of the plans.

ERISA defines the term "participants" to mean

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). The statute defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Id. § 1002(8).

A line of cases in the Fifth and Ninth circuits takes the same approach as the district court here. See *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980); *Weiss v. Sheet Metal Workers Local No. 544 Pension Trust*, 719 F.2d 302 (9th Cir. 1983); *Freeman v. Jacques Orthopedic & Joint Implant Surgery Medical Group*, 721 F.2d 654 (9th Cir. 1983). These cases hold that one is a participant or beneficiary only if he is now receiving benefits from the plan or reasonably expects to receive them in the future because benefits which are now unvested can reasonably be expected to vest later.

The wording of § 502(c) is identical in this respect to the language in § 502(a), conferring standing to bring an ERISA claim. Section 502(a)(1) provides that a civil action may be brought, inter alia, "by a participant or beneficiary." 29 U.S.C. § 1132(a)(1). Applying the logic of the above opinions to the standing provision leads to the conclusion that one has no standing to bring an ERISA claim -- i.e. no standing to claim that he is entitled to benefits -- unless he is entitled to benefits.[18]

We reject that conclusion as well as the reasoning which leads to it. We do not think that a person lacks standing to claim an entitlement to benefits just because it turns out that he is in fact not entitled to those benefits. When a court holds that a claimant is not entitled to benefits, the claimant loses on the merits and judgment is entered against him. As a practical matter, therefore, courts normally read § 502(a) as if it read: "a civil action may be brought by *someone who claims to be* a participant or beneficiary."[19]

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18. The Fourth Circuit, it should be noted, has expressly rejected this, holding that one may have standing to sue under § 502 even if he is not entitled to benefits. *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659 (4th Cir. 1986).

19. We have the same common sense understanding of provisions conferring standing and subject matter jurisdiction under other statutes. Section 4 of the Clayton Act, for example,

We think that the same reading should be accorded § 502(c). A provision such as that one, entitling people to information on the extent of their benefits, would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not. People who worked for a company for a time, and who are not certain whether or not they are entitled to benefits would obviously need the information § 502(c) discusses in order to know whether to press their claim.

Moreover, defendants' understanding would often allow the entitlement to information to turn on the plan administrator's belief as to the merits of the claimant's request for benefits. Yet simply because the plan administrator believes the claimant is not entitled to benefits does not mean that he is in fact not so entitled. The plan administrator might be wrong -- as he may have been with respect to the Termination Pay plan at issue in Count I of this complaint. Even the cases we reject would permit the employee to recover damages under § 502(c) if the claimant sues and it turns out that he was entitled to benefits. But if the employee is left uninformed his rights may remain unvindicated even if the administrator is wrong,

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confers jurisdiction on the federal district courts "to prevent and restrain violations of sections 1 to 7 of" title 15. We understand this provision to confer jurisdiction on the federal courts to hear *claims* that a violation has occurred (or will occur). If at the end of trial the court finds that there was no violation, so that the defendant wins, the victory is on the merits. We do not hold that, because there was no violation of the relevant antitrust provision, the court lacked subject matter jurisdiction.

We note that the Supreme Court rejected a similarly erroneous rule in *Bell v. Hood*, 327 U.S. 678, 682 (1946), where the Court explained that a lack of standing should not be confused with a lack of subject matter jurisdiction.

because the administrator's failure to provide information to the employee may prevent the employee from suing.

Finally, however, -- and this is the most compelling reason for our holding -- ERISA's legislative history makes clear that Congress intended the information-producing provisions to enable claimants to make their own decisions on how best to enforce their rights. See S. Rep. 93-127, 93d Cong. 1st Sess. at 27 (ERISA's reporting and disclosure requirements imposed so "that individual participants and beneficiaries will be armed with enough information to enforce their own rights"). That function can be performed only if all people with potential rights can obtain information.

Having said that, we concede that it is expensive and inefficient to provide people with information about benefits -- and permitting them to obtain damages if information is withheld -- if they are clearly not entitled to the benefits about which they are informed. But while this is indeed a problem, we do not believe it insuperable.

Section 502(c) grants significant discretion to the district court to decide whether to award damages under that provision. We think that that discretion can be used, for example by granting summary judgment in appropriate cases, to prevent strategic behavior by plaintiffs seeking to take unfair advantage of § 502(c)'s damage provisions when they are not entitled to any ERISA benefits. For example, if the employee's claim for benefits is not colorable, and if the employer displayed no bad faith in responding to the claim -- taking somewhat too long to respond to it, for instance, but not ignoring it entirely -- then the district court would be well within its discretion in setting damages at $0.

CONCLUSION

For the foregoing reasons, we will affirm the summary judgment on Counts III and V. However, we will reverse the summary judgment on Counts I and VII, and remand those aspects of the case to the district court for further proceedings consistent with this opinion.

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Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD BRUCH, *et al.*	:	CIVIL ACTION
v.	:	NO. 82-3286
FIRESTONE TIRE & RUBBER	:	
COMPANY, *et al.*	:	

MEMORANDUM AND ORDER

HUYETT, J. June 9, 1986

This ERISA class action arises out of the November 30, 1980 sale by Firestone Tire & Rubber Company ("Firestone") of five of its plants which, together, constituted its Plastics Division. All five plants were sold as ongoing operations to Occidental Petroleum, the Hooker Chemical Division. Of the seven original counts in the second amended complaint, five remain in this action. All five counts are the subject of the cross-motions for summary judgment which are presently pending before me. Before delving into a detailed analysis of the issues raised by each of plaintiffs' claims, I will outline briefly the facts underlying this action, the claims plaintiffs have raised, the procedural posture of the action, and the standard by which plaintiffs' claims must be evaluated.

The five plants which comprised Firestone's Plastics Divisions were located in Pottstown, Pennsylvania; West Caldwell, New Jersey; Perryville, Maryland; Salisbury, Maryland; and Baton Rouge, Louisiana and employed approximately 500 salaried employees. The six named plaintiffs are former, salaried, non-union employees who worked at the Pottstown, Pennsylvania plant. They represent four classes of salaried, non-union individuals who were employed in Firestone's Plastics Division on the date of the sale. Following the sale, plaintiffs and most of the other employees continued, without interruption, to perform their same jobs at the same rates of pay as employees of the new owner, Occidental.

Of the five remaining claims, four are being maintained on behalf of classes; one claim is being asserted by individual named plaintiffs. In count one, plaintiffs, representing a class

of all salaried employees employed in the five plants on November 30, 1980 except those employees who retired at the time of the sale or who have been paid termination pay with regard to their employment with Firestone's Plastics Division, claim that they are entitled to termination pay on the grounds that they were terminated by Firestone at the time of the sale; the sale, plaintiffs allege, constituted a reduction in force under Firestone's termination pay policies thereby entitling them to the termination pay.

Count three states a claim for redress for the difference under Firestone's Retirement Plan for Salaried Employees ("Retirement Plan") between an early retirement benefit and a deferred vested retirement benefit. Plaintiffs bring this claim on behalf of a class of all salaried, non-union employees at the five plants who did not qualify, before the date of the sale, for normal or early retirement under the Firestone Retirement Plan. In count five, plaintiffs, on behalf of a class of all salaried, non-union employees at the five plants who had non-vested accrued benefits credited to their accounts under Firestone's Stock Purchase and Savings Plan ("Stock Plan"), seek the vesting of their unvested interests in Firestone's contributions to the Stock Plan.

In count six, plaintiffs represent a class of all salaried, non-union employees who were employed in the five plants on the date of the sale who had vacation time accrued on November 30, 1980 but had not yet taken it. Plaintiffs claim that they are entitled to the vesting of credit for purposes of the Retirement and Stock Plans for the accrued vacation time which was unused at the time of the sale. Finally, in count seven, several individual plaintiffs state a claim for breach of ERISA's reporting and disclosure requirements.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, is a comprehensive statute designed to protect employees enrolled in pension and welfare benefit plans. ERISA provides a private right of action to any participant or beneficiary to enforce his or her rights under either a pension or a welfare benefit plan. 29 U.S.C. § 1132(a)(3)(B)(ii). Although pension and welfare benefit plans serve different purposes, ERISA subjects them to common reporting and disclosure requirements, 29 U.S.C. §§ 1021-31, and standards of fiduciary conduct, 29 U.S.C. §§ 1101-14. Welfare benefit plans, however, are not subject to ERISA's vesting provisions or minimum substantive provisions. Termination pay plans are now generally classified as "employee welfare benefit plans" within the meaning of 29 U.S.C. § 1002(1) and are, therefore, governed by ERISA.

Summary judgment may be granted only when it has been established that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Small v. Seldows*, 617 F.2d 992 (3d Cir. 1980). The court does not decide issues of fact, but merely determines if there is an issue of fact to be tried. *Ettinger v. Johnson*, 556 F.2d 692 (3d Cir. 1977). The facts must be viewed in the light most favorable to the non-moving party, and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Ins. Co. v. Bodie,* 682 F.2d 436 (3d Cir. 1982).

Firestone was the administrator of the three plans involved in the claims raised by plaintiffs, and as such, is a fiduciary under ERISA. In reviewing a decision by the administrator of a pension or welfare benefit plan, I am limited to determining whether the administrator's actions were arbitrary and capricious. Unless the decision was arbitrary and capricious, the administrator satisfied its fiduciary obligations under 29 U.S.C. § 1104.[1] *See Northeast Dep't. ILGWU Health*

1. Plaintiffs suggest that courts have developed a three-pronged test when applying the "arbitrary and capricious" standard, the three elements of which are: whether the decision of the trustees is supported by substantial evidence, whether the trustees have made an erroneous decision on a question of law, or whether the trustees have acted in bad faith. In this circuit, the courts have not articulated such a test; rather they have simply focused on whether the decision was arbitrary and capricious without further defining that standard. The three elements to the test plaintiffs propose are certainly factors to be considered but they alone are not determinative of whether defendants have breached their fiduciary duty.

and Welfare Fund v. Teamsters Local No. 229 Welfare Fund, 764 F.2d 147, 163 (3d Cir. 1985); *Wolf v. National Shopman Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984).

Count One—Termination Pay

In count one, plaintiffs seek the recovery of severance or termination pay benefits to which they claim they were entitled upon the sale of the Plastics Division. Upon divestiture of the five plants, Firestone refused to pay severance benefits, asserting that no event had occurred which gave rise to a right to such benefits.

At the time of the sale, Firestone maintained a non-funded, non-contributory severance pay benefit plan for its employees. The terms of the plan were set forth in two personnel documents. First, the Salaried Employees Handbook, which was in effect in 1980 and which was given to each employee, provided in pertinent part:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.
>
> The amount of termination pay you will receive will depend on your period of credited company service.

Plaintiffs contend that the sale constituted a reduction in force. The Handbook, however, does not provide any definition of "reduction in force."

Firestone's termination pay policies were set forth in greater detail in the Manual which was a confidential company document not generally circulated to employees, but which was, according to defendants, available for an employee to review upon request. A reduction in force (RIF) is defined generally in the Manual as "termination by the Company, without prejudice to the employee." Section 1.5.4. Section 2.11.3 further states:

> Despite the objectives of Firestone to provide stable employment, continued earnings and benefit coverages to

> its employees, there may be economic conditions that develop which make it necessary for the Company to temporarily or permanently terminate the employment of some of its work force.
>
> In the event such release must be made, the following reduction in force policies have been established with the goal of minimizing the economic and mental stress of terminated employees during the period of time between release from Firestone and securing other employment . . .

Plaintiffs contend that defendants may not properly rely on the provisions of the Manual because the language in section 2.11.3 which defendants cite in their motion for summary judgment was added to the Manual only one month before the November 30, 1980 sale. Plaintiffs also argue that this Manual was not made available to the employees. I note that plaintiffs, in their second amended complaint, specifically relied on provisions in the Manual to support their claim for termination benefits; it would be rather anomalous to permit plaintiffs to rely on a document while prohibiting defendants from using it to support their defense. Nevertheless, at oral argument, defense counsel stated that defendants did not consider reliance on the Manual essential to their position. Because I find sufficient grounds for rejecting plaintiffs' termination pay claim without reference to the Manual, I need not decide whether reliance on the Manual is appropriate.

There is no dispute that Firestone's termination pay plan was an "employee welfare benefit plan" and as such is subject to the fiduciary and reporting and disclosure requirements of ERISA. *See* 29 C.F.R. § 2510.3-1(3). Employee welfare benefit plans, however, are not subject to the vesting and minimum substantive content provisions of ERISA. The issue that arises, therefore, is whether, in the absence of a statutory guarantee or right in an employer's termination pay plan, an employer, who has offered such a plan, may later terminate the plan without incurring liability for the previously prom-

ised benefits. Plaintiffs contend that the employer may not; employees acquire a contractual interest in welfare benefit plans enforceable under federal common law.

The court in *Adcock v. The Firestone Tire & Rubber Co.*, 616 F. Supp. 409, 414-419 (1985), facing precisely the same claim raised by plaintiffs here, held that the plaintiffs, salaried non-union employees, possessed a contractual right to benefits under the Firestone severance pay plan, a deferred and contingent right.[2] "The plan is subject to the procedural protections contained in ERISA, that is, reporting and disclosure requirements and fiduciary standards, but with substantive rights governed by common law contract principles." *Adcock* at 419.

I reach the same conclusion in this action. ERISA is silent as to the rights an employee has in welfare benefit plans; therefore, it is necessary to look to another source to determine what rights, if any, an employee has in welfare benefits. The source is federal common law: "Congress intended that a body of Federal substantive law ... be devel-

2. In *Adcock v. Firestone*, 616 F. Supp. 409 (1985), Judge Wiseman relied heavily on the district court's decision in *Hansen v. White Farm Equipment Corp.*, 42 B.R. 1005, 5 EBC 2130 (N.D. Ohio 1984), in which the court held that under contract principles, welfare benefit plans "vest upon retirement" and cannot be terminated even in the face of plan language which unequivocally authorizes such action. Defendants submitted for my conside. ıtion a copy of the Sixth Circuit's slip opinion in *Hansen* in which the court reversed the district court's holding. *See Hansen v. White Motor Corp.*, 788 F.2d 1186 (6th Cir. 1986). Defendants argue that the Sixth Circuit, in *Hansen*, rejected a federal common law, contractual analysis. However, in *Hansen*, the Sixth Circuit merely held that contract principles do not result in the absolute vesting of employee welfare benefits and no federal policy mandates a federal common law rule limiting the right of an employer to exercise after retirement a reserved right of termination of employee welfare benefits. The *Hansen* court accepted the notion that an employee may have a contractual right in his or her welfare benefits; the court rejected the concept that federal common law should define the substantive content of the contract. "It is the district court's further conclusion that a federal rule of decision should be created barring termination of welfare benefit plans, regardless of any clear, express contractual provision, which gives us pause." *Hansen*, slip op. [sic] at 1192.

oped by the court to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits). As the court in *Adcock* emphasized, the employer-employee relationship is contractual. Benefits are part of the package for which an employee exchanges his labor. The issue here is whether the termination pay benefits are contractual rights.

To create a binding contract, there must be an offer and an acceptance of the offer; both acts must be supported by sufficient consideration. As in *Adcock*, in this case, the employee's Handbook states that:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.

This provision constitutes an offer by Firestone to pay termination benefits in the event of a reduction in work force or a mental or physical disability by the employee. Plaintiffs accepted this offer by performing their jobs, at all times subject to the terms of the Handbook. Plaintiffs, therefore, acquired a contractual interest in the termination benefits which interest is subject to the procedural protections of ERISA. However, where the terms of the policy are susceptible to more than one reasonable interpretation, ERISA mandates that the court not substitute its judgment for that of the administrator.[3] Therefore, Firestone's interpretation of plaintiffs' rights will prevail unless it is arbitrary and capricious.

Relying on the court's analysis in *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985), plaintiffs argue that they are entitled to termination pay because defendants' administration of the plan was so flawed by ERISA violations

3. Plaintiffs argue that where there is an ambiguity in the plan, the contractual ambiguity must be resolved against the author of the contract. This standard conflicts directly with the deference due the administrator and the arbitrary and capricious test of ERISA and is, therefore, pre-empted by ERISA.

that it was per se arbitrary and capricious to deny termination pay. In *Blau*, the court held that where defendant's administration of the plan was characterized by many ERISA violations, the lower court could not determine as a matter of law that the denial of severance pay was not arbitrary and capricious. The court found that Del Monte had not only made no attempt to comply with any of the duties imposed on a plan administrator by ERISA but also actually concealed the severance allowance policy. Moreover, in *Blau*, the termination pay plan provided that termination pay would be granted upon job elimination whenever "alternative employment opportunities are unavailable within the corporation." Del Monte nevertheless failed to apply this standard.

Although Firestone could have taken additional steps to advise plaintiffs of its policies, there is no evidence that it actively concealed its policies in the manner Del Monte had. The Handbook was available to all salaried employees, and it clearly stated that termination pay was available only in the event of a reduction in force or physical or mental disability. Moreover, prior to the sale, Firestone employees who inquired as to termination pay were told that termination pay would not be awarded at the time of the sale; management also apparently made several statements to this effect at the public meetings held for employees prior to the sale.

As the court in *Adcock* noted, *Blau* establishes a very high threshold for determining arbitrary and capricious conduct vis-a-vis noncompliance with ERISA's procedural requirements. Even if I accept all of plaintiffs' allegations as true, I do not believe that Firestone's conduct rises to the level of culpability necessary to cross the threshold set in *Blau*.

Defendant Firestone contends that under its termination pay policy, it had no obligation to pay termination pay benefits upon the sale of an ongoing operation when its former employees were immediately employed by the successor corporation without any significant loss in earnings or benefits. After a careful review of the facts of this case, existing case law, and Firestone's own past practices, I conclude that Firestone's decision to deny plaintiffs termination pay benefits was not

arbitrary and capricious and therefore not a breach of its fiduciary obligations under ERISA.

Plaintiffs' claim for termination pay is based on the theory that a reduction in force occurred when Firestone sold the five plants. No precise definition of reduction in force has been developed; therefore, the issue is whether Firestone's decision that the sale of the five plants did not constitute a reduction in force was arbitrary and capricious. In reviewing this situation, I must give deference to Firestone's decision. However, because Firestone avoided the outlay of a substantial amount of money by denying the plaintiffs termination pay, the deference I owe to that decision is reduced, and I may scrutinize the decision more closely. Nevertheless, I conclude that the decision to deny termination pay benefits was not arbitrary and capricious.

As noted, the Handbook merely states that termination pay will be available in the event of a reduction in force. The Manual defines a "reduction in force" broadly as "termination by the company, without prejudice to the employee." From this language, plaintiffs argue that they were entitled to receive termination benefits unless they left the employ of Firestone as a result of their own misconduct. I do not believe that this conclusion results from the limited language included in the Handbook or the Manual.

Although these two documents provide little guidance in defining the term "reduction in force," it is noteworthy that nothing in these documents suggests that a reduction in force would occur at the time of the sale of an operation as an ongoing business. General common usage of severance pay comports with the conclusion that termination pay would not be paid to employees who remain in the same job and continue to draw the same wage after the sale of a plant as an ongoing business. These employees suffered none of the hardships normally associated with a termination or reduction in force; they had no period of unemployment without income. Plaintiffs were immediately rehired by Occidential without missing a day of work.

The case law supports Firestone's interpretation of the

Termination Pay Plan. Holding that the administrators of the Plan acted in a rational and reasonable manner and in good faith in denying the plaintiffs termination pay upon the sale of a division as a going business, the court in *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983), affirmed the lower court's conclusion that "severance pay is generally intended to tide an employee over while seeking a new job and should be considered an unemployment benefit." Similarly, the court in *Jung v. FMC*, 755 F.2d 708 (9th Cir. 1985), distinguishing its earlier decision in *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), held that FMC's interpretation of the plan as not providing for severance benefits upon divestiture and transfer of employment was not arbitrary and capricious. The court also noted that to allow plaintiffs to recover severance pay would, in effect, allow a windfall to them when they retained their positions with the new owner.

Addressing Firestone's termination policy, Judge Wiseman in *Adcock v. The Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), held that "continued employment with a successor corporation following the transfer of ownership, although characterized by a termination of employment with the predecessor corporation, does not constitute an involuntary reduction in work force by the predecessor corporation thereby entitling the employee to severance pay benefits." Recently, Judge Todd reached the same conclusion in *Davidson v. Firestone Tire & Rubber Co.*, No. 84-1215, slip op. (W.D. Tenn. April 21, 1986) [Available on WESTLAW, DCTU database].

> Just as an employee who is rehired no longer has a need for termination pay, an employee who never leaves his job when a Firestone division is sold as a going concern has no reasonable expectation of receiving termination payments. Put simply, the termination pay program was intended to help those employees defendant Firestone believed needed the help, and not to give windfalls to former employees who did not need the help.

Davidson, slip op. at 6.

Firestone's past practices have been consistent with the position it adopted in this case. Before the sale of the Plastics Division, Firestone sold plans [sic] as ongoing businesses on at least three occasions. In 1984, Firestone sold two adhesive plants, one in Detroit, Michigan and one in Trenton, New Jersey. The purchaser of the plant, in each case, agreed to hire the existing employees, and on that basis, Firestone decided not to award termination pay. Similarly, in March 1975, Firestone sold its World Bestos plant in New Castle, Indiana. Again the purchaser agreed to hire all employees, and the employees were not paid termination pay by Firestone.

Employees who were terminated at the time of the closure of the Pottstown, Pennsylvania tire plant received termination pay, but as defendants note, these employees lost their jobs. There was no new owner to take over the plant; it ceased to operate. Therefore, plaintiffs' reliance on this episode is misplaced. Plaintiffs also rely on the fact that Firestone made payments to former employees who had worked at the Newport, Tennessee industrial products facility before Firestone sold it as a going concern. The new owner of the Newport, Tennessee plant offered benefits which were substantially less than Firestone's benefits; for example, the successor company had no pension plan at all and provided a much lower level of health insurance and other benefits. Although Firestone concluded that these employees were not entitled to termination pay, to provide partial relief from this special hardship, Firestone adopted a one-time policy applicable to the Newport plant and granted the employees a Service Recognition Award. Robinson Affidavit at ¶ 12.

As the court in *Davidson* concluded, the fact that Firestone made payments to the Newport employees does not support the argument that the refusal to pay termination benefits to plaintiffs was arbitrary and capricious. Firestone made the payments to its former Newport employees to compensate them for the significant reduction in benefits. Therefore, these employees did not receive a windfall. Although there are some differences in the benefits packages offered by Occidental and Firestone, counsel for plaintiffs was unable to

elaborate on these differences at oral argument; the differences which have been identified do not strike me as significant and certainly not as great as the differences which warranted the payment of the Service Recognition Award to the Newport employees.

For all these reasons, I conclude that Firestone's decision not to pay plaintiffs and the employees they represent termination pay was not arbitrary and capricious, and defendants are entitled to summary judgment on this count.

Count three—Retirement Benefits

Count three states a claim for redress for the difference under Firestone's Retirement Plan for Salaried Employees between an early retirement benefit and a deferred vested retirement benefit. Under the Retirement Plan, employees who had ten years of service and had reached age 55 or had thirty years of service, qualified for early retirement; the early retirement benefit consisted of the annual retirement income reduced by .4% for each month by which the employee's retirement age was less than age 62 and .2% for each month the retirement age was less than age 50. The early retirement benefit was not a vested benefit. Defendants, therefore, concluded that any employees who had not qualified for this benefit by the time of the sale lost their right to it and could receive only a deferred vested retirement benefit.

A deferred vested retirement benefit entitles an employee, who is terminated before he or she is eligible for the early retirement benefit but who has ten or more years of credited service, to receive a pension before age 65 in an amount which will be actuarially equivalent to the amount that would otherwise have been payable at the normal retirement age 65. In other words, the deferred benefit is reduced from the amount available at age 65 at an actuarial rate. The early retirement is, therefore, more favorable for employees.

Plaintiffs claim that they are entitled to an early retirement benefit rather than a deferred vested retirement benefit, and as a result of the sale of the Plastics Division by Firestone, the early retirement benefits to which they were entitled under the Retirement Plan were improperly reduced. Plaintiffs now agree that they did not qualify for the early retirement benefits under the terms of Firestone's Retirement Plan, but they contend that they should receive the early retirement benefit because (1) the summary plan description of the relevant Retirement Plan provisions was misleading and incomprehensible to the average plan participant, in violation of section 101(a) of ERISA, 29 U.S.C. § 1021(a), which sets forth disclosure requirements and Firestone is therefore "equitably estopped" from reducing plaintiffs' retirement benefits, and (2) plaintiffs are entitled to the early retirement benefits because they "reasonably anticipated" receiving the greater benefit and are therefore entitled to it.

The early retirement plan is set forth in detail in the May 1, 1979 Summary Plan Description.[4] Numerical examples are

4. Page 7 of the May 1, 1979 Summary Plan Description states the early retirement benefit in detail as follows:

How much do you get at early retirement?

You may retire from the Company before your normal retirement date if you are at least age 55 and have ten or more years' service, or if you have 30 or more years' service regardless of your age.

If you are age 62 or over

Your early retirement benefit will be calculated under the Basic Benefit Formula and the Final Average Earnings Formula—the same manner as the age 65 normal retirement benefit—based on your service and earnings to early retirement. You will receive 100% of the greater of the two amounts. There is no reduction for the commencement of this retirement benefit between age 62 and age 65.

If you are under 62

Your benefit amount is calculated in the same manner as described above then multiplied by a percentage from this table:

If your pension begins at:	This is your percentage:
Age 62	100.0%
Age 61	95.2
Age 60	90.4
Age 59	85.6
Age 58	80.8
Age 57	76.0
Age 56	71.2
Age 55	66.4

provided which illustrate how the benefit is reduced if the retiring employee is under 62. For instance, if the employee is 55 at the time he or she retires, the employee will receive 66.4% of his or her normal retirement pension.

For ages less than 55, the table is appropriately extended.

(EXAMPLE: Age 60, monthly retirement benefit before reduction is \$548. \$548 × 90.4% = \$495.39)

The reduction for the commencement of this retirement benefit before age 62 is 4/10 of 1% for each month (4.8% for each year) your age at retirement is under 62. The percentage of reduction for ages under 55 continues at 4/10 of 1% to age 50. Then the percentage becomes 2/10 of 1% for each month (2.4% for each year) your age at retirement is under age 50. The reduction takes into account the longer period of time over which you would be receiving benefits.

Page 11 of the May 1, 1979 Summary Plan Description deals with the deferred vested benefit and states as follows:

How much do you get if you should leave before retirement?

Your Retirement Plan can provide benefits if your service with the Company terminates before you are eligible for retirement.

If you have 10 or more years of credited service upon your termination:

You may receive a deferred vested pension calculated in the same manner as the normal retirement benefit based on your service and earnings to the date of your termination of employment. Your deferred vested pension will become payable when you reach your normal retirement age 65, or in a reduced amount before age 65.

You may request a refund of your contributions made before July 1, 1977 with interest at your termination of employment or at any time prior to payment of your deferred vested pension. However, if you do request a refund of your contributions, you will forfeit that portion of your retirement benefits attributable to your contributions with interest. The reduced benefit will not be less than that which would have accrued had you made no contributions.

You may elect that your deferred vested pension begin prior to your age 65—on the first day of any month which is after you attain age 55. However, the amount payable monthly will be reduced and will be actuarially equivalent to the amount that would otherwise have been payable at your normal retirement age 65.

If you have less than 10 years of service upon your termination: you will receive a lump sum equal to your total contributions with interest.

On page 11 of the May 1, 1979 Summary Plan Description, there is a section captioned: "How much do you get if you should leave before retirement?" In setting forth the conditions under which an employee may receive a retirement pension if he or she leaves Firestone before becoming eligible, the Summary provides that an employee who has ten years credit upon leaving will, at the age of 55, be able to start receiving a pension. If the employee elects to start receiving the deferred vested pension before turning 65, the Summary provides that "the amount payable monthly will be reduced and will be actuarially equivalent to the amount that would otherwise have been payable at your normal retirement age 65." May 1, 1979 Summary Plan Description p. 11.

Pursuant to section 102(a) of ERISA, a summary plan description must be "written in a manner calculated to be understood by the average plan participant," i.e. written in layman's language, and it must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022 (a)(1). Plaintiffs contend that the May 1, 1979 Summary Plan Description which outlines the two retirement benefits failed to meet these ERISA standards.

At oral argument, plaintiffs' counsel suggested that the alleged defects in the May 1, 1979 Summary Plan Description could have been remedied by the addition of a single sentence to the effect that actuarial reduction is different from the reduction for the early retirement benefit. Plaintiffs attempt to illustrate the misleading effect of the Summary Plan Description by including excerpts from the depositions of the class representative to the effect that they had thought that they would be entitled to the greater retirement benefit at 66.4% rather than the deferred vested retirement benefit at 40.7%. Plaintiffs also contend that the Summary should have provided examples or hypothetical questions and answers to explain the nature of or the amount of the reduction applicable to a deferred vested pension. Failure to include an explanatory sentence or otherwise to make clear the difference between the early retirement benefit and the deferred vested

retirement benefit, plaintiffs contend, resulted in a misrepresentation and a violation of the disclosure requirements of ERISA and estops defendants from denying plaintiffs and the employees they represent the early retirement benefits.

In order to invoke the doctrine of equitable estoppel, plaintiffs must establish three elements: a misrepresentation or omission of a material fact by one party, reasonable reliance on that misrepresentation by the other party, and detriment to the other party. *Community Health Services v. Califano*, 698 F.2d 615, 620 (3d Cir. 1983), *rev'd on other grounds*, 467 U.S. 51, 104 S. Ct. 2218, 81 L.Ed.2d 42 (1984).

In their motion for summary judgment, defendants contend that the plan descriptions fully comport with the requirements of ERISA. Defendants first note that the distinction between early retirement benefits and the deferred vested retirement benefits is specifically provided for in ERISA. Section 206(a) of ERISA provides:

> In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit but separated from service . . . before satisfying the age requirement . . . is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

29 U.S.C. § 1056(a). This is exactly what defendants provided in the Summary.

In response to plaintiffs' argument that there has been a misrepresentation giving rise to equitable estoppel, defendants persuasively argue that there has been no misrepresentation. I agree. The Summary was written in a "manner calculated to be understood by the average plan participant," and it is sufficiently "accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a) (1). The

Summary specifically set forth the terms under which an employee would be entitled to early retirement; if he or she did not satisfy these requirements, he or she would not receive the benefit.

Furthermore, plaintiffs and the employees they represent should have been alerted to the fact that the deferred vested retirement benefit differed from the early retirement benefit even if they did not understand the concept of actuarial reduction. First, the Summary stated in clear and simple terms that an employee was eligible for early retirement only if he or she either completed thirty years of service or completed ten years of service and reached age 55 while working for Firestone. Second, the section addressing deferred vested benefits was separate from the section addressing the early retirement and was captioned "How much do you get if you should leave before retirement?"; this should have suggested to an employee that if he or she left the employ of Firestone before qualifying for an early retirement benefit, he or she would be subject to different rules. Finally, the Summary clearly provides that the deferred vested retirement benefit would be actuarially reduced from age 65 while the early retirement benefit, on the other hand, was reduced from age 62. The references to the different ages from which reductions would be made should have alerted any employee that there was a difference between the benefits. Moreover, the reduction for those less than 62 would be .4% up to age 50 while an employee, under the deferred vested benefit, could not start receiving the benefit until age 55. There is simply no basis for the argument that the May 1, 1979 Summary Plan Description did not put plaintiffs on notice that the two reductions would be different.

Similarly, I cannot accept plaintiffs' argument that the Summary was flawed because it did not include numerical examples illustrating the actuarial reduction under the deferred vested plan. Actuarial tables do change and application of the tables vary among different persons. Therefore, it may well be more misleading to include actuarial examples than to exclude them. Because I conclude as a matter of law that

there was no misrepresentation, I need not reach the issues of reliance and damages.

Plaintiffs also argue that they are entitled to the early retirement benefits because they reasonably anticipated them. In support of this contention, plaintiffs rely on *Northeast Dep't. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229*, 764 F.2d 147, 163 (3d Cir. 1985), in which the court struck down an escape clause in a benefit plan and noted that "one very important policy underlying ERISA is that employees enrolled in a benefit plan should not be deprived of compensation that they reasonably anticipate . . ." Plaintiffs would have me conclude, in effect, that if their interpretation of the retirement plan is reasonable and it differs from defendants', plaintiffs' interpretation should govern. I reject this analysis on two grounds. First, for the same reasons that I concluded that there was no misrepresentation in the Summary, there is no basis for plaintiffs to expect that the early retirement and deferred vested benefits would be equivalent. Second, plaintiffs' theory is inconsistent with the standard of review under which I must approach this case, i.e. the arbitrary and capricious standard. *Northeast Dep't. ILGWU*, 764 F.2d at 163. Defendants' decision must be sustained unless that decision was arbitrary and capricious. I cannot defer to plaintiffs' interpretation although it is one factor to be considered.

For all these reasons I conclude that defendants are entitled to summary judgment as to count three.

Count five—Stock Plan

Count five pertains to the Stock Purchase and Savings Plan ("Stock Plan"). Plaintiffs seek the vesting of their unvested interests in Firestone's contributions to the Stock Plan; they contend that they improperly suffered the forfeiture of certain stock credited to their accounts at the time of the sale of the Plastics Division. Under the terms of the Stock Plan, for every dollar an employee invested in his account, Firestone would contribute fifty cents. There was an annual accounting system whereby the money invested by Firestone would be

treated as a unit, and each unit would gradually become vested starting in year two, with full vesting occurring in year five.

If an employee was terminated, he or she was entitled to a distribution of the vested portion of his or her stock account. If termination occurred before the fifth year, the employee forfeited his or her unvested stock unless there was a termination or "partial termination" of the Stock Plan. Plaintiffs contend that the sale and closing of the Plastics Division by Firestone constituted a partial termination of the Stock Plan resulting in their shares becoming nonforfeitable. Plaintiffs also contend that the failure of the trustees of the Plan to make a specific determination that the Stock Plan would or would not be partially terminated by the sale was a breach of their fiduciary duties and arbitrary and capricious.

ERISA provides that upon complete or partial termination of a plan, "benefits accrued to the date of such . . . termination . . . are nonforfeitable." 29 U.S.C. § 411(d) (3). The Stock Plan itself provides in section 12.02:

> If the Plan is terminated, or partially terminated, or upon complete discontinuance of contributions under the Plan, the rights of all affected employees to the amounts credited to such employees' accounts at the date of termination, partial termination or discontinuance, are nonforfeitable.

Plaintiffs argue first that a partial termination of the Stock Plan occurred on November 30, 1980 making their unvested interests nonforfeitable. ERISA provides no guidance as to what constitutes "partial termination" of a plan; similarly, the Stock Plan sets forth no definition of "partial termination." Most courts when addressing this issue have looked to the IRS regulations and rulings for guidance. The Treasury regulations also do not provide a precise definition of "partial termination," but the regulations do state that whether or not a "partial termination" has occurred "will be determined on the basis of all the facts and circumstances." Treas. Reg. § 1.201-6(b) (2) (1963).

When applying these regulations, the Secretary of the Treasury has focused on whether a significant percentage of the employees covered by the plan are excluded after the event in issue. *See* Rev. Rul. 81-27, 1981-1 C.B. 228. *See also Babb v. Olney Paint Co.*, 764 F.2d 240, 242 (4th Cir. 1985); *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113, 1115 (D. Kan. 1984). No specific percentage has been established as the magical figure at which a partial termination occurs, and the court in *Babb* held that what constituted a significant percentage is preeminently a matter of fact. *Babb*, 764 F.2d at 242. Defendants contend, however, that a general rule has emerged that a partial termination will be found if more than thirty percent (30%) of a plan's participants are terminated. Defendants further argue that no partial termination resulted from the sale of the Plastics Division because only 228 of the 10,500 participants, or 2%, were terminated.

Defendants' position is supported by *Babb* in which the court held that no partial termination occurred when 12.4% of the employees were terminated from the plan. The court noted that the decision to sell a division and to terminate the employees was made as a business decision in light of hard economic times and not as a means to curtail benefits to employees.

In their motion for summary judgment, plaintiffs contend that I should not look solely to the percentage of employees affected; rather, I should focus on the "hard numbers" and the other facts and circumstances particular to the case. Plaintiffs rely heavily on *Weil v. Retirement Plan Administrative Comm.*, 750 F.2d 10, 12 (2d Cir. 1984), in which the court gave "great weight" to the Secretary of the Treasury's interpretation of "partial termination" but stated that the Secretary's standard was whether there had been "the dismissal of a 'significant number of employees' in connection with a major corporate event." *Id.* at 12.

In *Weil*, the court held that the lower court erred in concluding as a matter of law that there had been no partial termination and remanded for further development of the factual record. Although only 27% of the participating employees were terminated, the *Weil* court noted that when only the employees in New York City were considered, the percentage increased to 62%. Moreover, the court focused on whether a substantial number of employees were terminated rather than a substantial percentage. It is interesting to note that the plaintiffs in *Weil* were left unemployed whereas the plaintiffs in this case continued employment with the new owner.

Plaintiffs emphasize the major corporate event language in *Weil*, and argue that emphasis should be placed on the fact that there was a major corporate event in this case; an entire division, the Plastics Division, was sold. Moreover, in *Weil*, the court looked at what happened within the single market, New York City. Plaintiffs argue that such an approach in this case reveals that 100% of the employees with unvested stock contributions in the Plastics Division were terminated, supporting the view that a partial termination occurred.

Although I agree with plaintiffs that the issue of partial termination cannot be addressed by the purely mechanical application of a substantial percentage or number test, i.e., that the significant percentage or number tests are not per se determinative, I conclude that no partial termination of the Stock Plan occurred in this case. This is not a close case like that facing the court in *Weil* where 27% of all participants in the relevant plan were dismissed; here, only 2% of the participants in the Stock Plan were affected by the sale.

In *Weil*, the court remanded for the further development of the factual record; the court suggested that the district court consider not only the percentage of employees affected but also the absolute number affected as well as the circumstances surrounding the termination, i.e., the corporate event. Termination of 27% of all participants or 104 employees taken in conjunction with the closing of the entire New York City operation could make the 27% significant and constitute a partial termination. Although Firestone's sale of the Plastics Division could be termed a major corporate event, nothing in *Weil* suggests that a major corporate event without the termination of a substantial number or percentage of the

employees will constitute a partial termination. Termination of only 2% or 228 of the plan participants will simply not give rise to a partial termination. I also reject plaintiffs' suggestion that I should consider only the employees employed in the Plastics Division.

Plaintiffs also argue that defendants' action with regard to the Stock Plan was arbitrary and capricious because the Committee charged with administering the Stock Plan never considered the question of whether the sale of the Plastics Division would constitute a partial termination. Plaintiffs contend that the Committee was under an obligation to develop an evidentiary record and then make a "decision" regarding the issue of partial termination. Plaintiffs rely heavily on *Toland v. McCarthy*, 499 F. Supp. 1183 (D. Mass. 1980), in which the court reviewed the decision of the pension plan trustees denying an employee's application for a normal pension upon early retirement.

Plaintiffs' reliance on *Toland* is misplaced. *Toland* arose from a complex factual situation in which issues of plaintiff's employment history, plaintiff's coverage by a collective bargaining agreement, and inferences about his job classification were raised. In this case, the issue was much simpler and more straightforward. Only two percent of all of the Plan participants were affected by the sale. Therefore, although the sale constituted the divestment of an entire division, it was clear that no partial termination had occurred. There was no decision to be made by the Committee, and therefore, it would have been pointless for them to meet to make a "decision," let alone to develop an evidentiary record. My comments are limited to the facts of this case. Under different circumstances, e.g. a greater percentage of affected employees, the Committee might well be under an obligation to meet and make a reasoned decision. This, however, is not that case. Accordingly, I conclude that defendants are entitled to summary judgment as to count five.

Count Six—Vacation Credit

In count six, plaintiffs seek vesting credit for purposes of the Retirement Plan and the Stock Plan for accrued vacation

time which they had not yet taken at the time of the sale. Under the Firestone system, an employee accrued vacation time during one year which could be taken during the next fiscal year. Therefore, on October 31 of each year, an employee was notified of the amount of vacation time he or she had accrued which he or she could take during the twelve months starting November 1. The sale of the Plastics Division occurred on November 30, 1980 so many employees had accrued vacation time which they had not yet taken. Under the terms of the sale, Firestone reimbursed Occidental for the vacation pay due to the employees so they actually received the vacation time during the eleven months following the sale, but they forfeited the vacation credit for purposes of the Retirement and Stock Plans. Plaintiffs claim that Firestone violated section 202 (a) (3) (C) of ERISA, 29 U.S.C. § 1052(a) (3) (C), and 29 C.F.R. § 2530.200b-2 (a) (2) by not counting plaintiffs' accrued vacation time for purposes of computing their vested interests under the Retirement and Stock Plans.

Plaintiffs contend that the regulations require that they be credited for each hour for which they were paid by Firestone on account of a period of time during which no duties were performed for a reason such as vacation.[5] Because Fire-

5. §2530.200b-2 Hour of service.

(a) *General rule.* An hour of service which must, as a minimum, be counted for the purposes of determining a year of service, a year of participation for benefit accrual, a break in service and employment commencement date (or reemployment commencement date) under sections 202, 203 and 204 of the Act and sections 410 and 411 of the Code, is an hour of service as defined in paragraphs (a) (1), (2) and (3) of this section. The employer may round up hours at the end of a computation period or more frequently.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

(2) An hour of service is each hour for which an employee is paid, or entitled to payment, by the employer on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave

stone admits that it paid Occidental to provide plaintiffs with the vacation they accrued before the sale, plaintiffs contend that they are also entitled to the credit for these vacations. Plaintiffs contend that the regulations expressly state that the fact that the employment relationship has terminated makes no difference to the application of the credit regulation.

In their motion for summary judgment, defendants contend that they were justified in denying the credit on the basis of the elapsed time method of calculating credit; use of this method, defendants argue, was not arbitrary or capricious. Defendants argue that ERISA has approved two methods of calculating employee service for purposes of vesting. The first method is that upon which plaintiffs rely, hours of service. The second method is the elapsed time method under which an employee receives credit for the entire period of time that the employment relationship exists. Under this method, the starting point for crediting service is the "employment commencement date," and the end point is the date on which the employee retires, dies, quits or is discharged.

For both the Retirement Plan and the Stock Plan, Firestone uses the hours of service method to determine eligibility or participation in the Plan and the elapsed time method for determining vesting. Under the latter, plaintiffs are not entitled to credit for the vacation time they had accrued but not taken for vesting purposes under the Retirement and Stock Plans.

The elapsed time method was authorized originally by regulations promulgated by the Department of Labor and later revised and promulgated by the Treasury Department (26 C.F.R. § 1.410(a)-7) and approved by the court in *Swaida v. I.B.M. Retirement Plan*, 570 F. Supp. 482, 488 (S.D. N.Y.), *aff'd*, 728 F.2d 159 (2d Cir. 1984), *cert. denied*, 469 U.S. 874, 105 S. Ct. 232, 83 L.Ed.2d 161 (1984). In *Swaida*, plaintiff sought a judgment declaring IBM's use of the elapsed time method for computing service for vesting credit under its retirement plan, a violation of the vesting standards of ERISA.

of absence. Notwithstanding the preceding sentence. [sic]
29 C.F.R. § 2530.200b-2

The court, holding that the elapsed time regulations promulgated by the Department of the Treasury were a product of a proper exercise of its delegated authority, declined to issue such a judgment.

Similarly, I conclude that Firestone's use of the elapsed time method to determine vesting of plaintiffs' retirement benefits and stock plan accounts was neither arbitrary nor capricious. Use of this method is supported both by the legislative history and the applicable Labor and Treasury regulations. I, therefore, conclude that defendants are entitled to summary judgment as to count six.

Count Seven–Disclosure.

In count seven of the second amended complaint, several individual plaintiffs seek monetary relief pursuant to section 502(c) of ERISA, 29 U.S.C. § 1132(c), for violations by defendants of ERISA's disclosure requirements. Plaintiffs claim (1) that Firestone failed to comply with certain disclosure and filing obligations set forth in section 104 of ERISA, 29 U.S.C. § 1024, with regard to its Termination Pay Plan, Retirement Plan, and Stock Plan (Complaint ¶¶ 87-90), and (2) that they are entitled to discretionary damages under section 502(c) of ERISA because of Firestone's alleged failure to respond properly to their written requests for information concerning the Retirement Plan and the Stock Plan (Complaint ¶¶ 91-93). In their motion for summary judgment, plaintiffs add a claim based on Firestone's alleged failure to respond properly to written requests for information about the Termination Pay Plans; this claim had not previously been raised. I will address plaintiffs' claims *seriatim*.

First, with respect to plaintiffs' claim pursuant to section 104, 29 U.S.C. § 1024, and the so-called "automatic" disclosure and filing requirements, ERISA provides no private cause of action for monetary damages for violation of these provisions.[6] Section 502(c), 29 U.S.C. § 1132(c), sets forth the

6. Section 104(b)(4) of ERISA, 29 U.S.C. §1024(b)(4), provides:

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any termi-

limited remedies available to private plaintiffs for violation of ERISA's disclosure and filing requirements, and this section applies only when and if a plan administrator refuses to comply with a written request for information.[7] Accordingly, plaintiffs do not have a cause of action for damages for Firestone's alleged failure to comply with the automatic provisions. Plaintiffs apparently recognized this fact as they dropped reference to this claim in their motion for summary judgment.

The next issue is whether plaintiffs are entitled to damages pursuant to section 502(c) for Firestone's alleged failure to respond to information requests. As I noted at the outset, plaintiffs had not previously claimed that defendants had failed to comply with requests for information regarding the termination pay plans. However, because I believe that there are other grounds for denying plaintiffs' claims, I will not rely on this procedural basis for the denial.

Section 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4), imposes a duty on a plan administrator to respond to written requests for information about the plan. However, pursuant to section 104(b)(4), the plan administrator is obligated to re-

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nal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

7. Section 502(c) of ERISA, 29 U.S.C. §1132(c), provides:

(c) Administrator's refusal to supply requested information.

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

spond only to requests from a plan participant or beneficiary. Defendants contend that the three plaintiffs who have been identified as having made requests to which there were allegedly no adequate responses ever made, Smolinski, Schade, and Bruch, were not participants in or beneficiaries of the relevant plans at the times they made their respective requests, and therefore, were owed no responses under section 104(b)(4). Moreover, defendants contend that Smolinski, Schade, and Bruch have not established that they were harmed by the lack of response to their inquiries.

A "participant" under ERISA is "any employee or former employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan" while a "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(7) and (8).

Smolinski and Schade were at one time participants in the Termination Pay Plan; they could potentially have become eligible for termination pay if they were "terminated" as that term was defined for purposes of the Plan. However, because they were no longer associated with Firestone, in 1981, when they made their requests, Smolinski and Schade, would not become eligible in the future for termination pay. Similarly, as I have ruled above, plaintiffs were not presently eligible for termination pay at the time of the sale because the sale of the plants as ongoing operations did not constitute a reduction in force. In addition, both Smolinski and Schade received letters in response to their letters in which they were advised that they were not eligible for termination because they had continued employment with Occidental. I also note that plaintiff Smolinski received four detailed letters with various enclosures in response to his request for information about the Retirement Plan.

Plaintiff Bruch contends that he never received a response to his written request for information about the Stock Purchase Plan. Bruch made his request, on May 4, 1981, five months after the sale and five months after he ceased working for Firestone. Although plaintiff continued to be a partici-

pant in the Retirement Plan because of his vested retirement interest, he ceased to be a participant in the Stock Plan at the time of the sale. He received distribution of his vested interest and his unvested interests were forfeited. Thus, he did not have a contingent right to "receive a benefit" from the Stock Plan after November 30, 1980.[8]

Finally, although it has not been clearly established that a plaintiff, to prevail on a claim under § 502(c) of ERISA, must establish prejudice, I believe it is relevant that plaintiffs have not presented any evidence to show that they have sustained any harm from defendants' alleged failure to respond to their requests for information. For all these reasons I do not believe that plaintiffs are entitled to an award of discretionary damages pursuant to section 502(c), and I shall enter judgment for defendants on count seven.

An appropriate order follows.

8. Even if I had concluded that plaintiffs were entitled to have their unvested shares in the Stock Plan vested because there had been a partial termination of the Stock Plan, my conclusion with respect to Bruch's disclosure claim would not change. Bruch's rights in the Stock Plan were determined as of the date of the sale; he had no remaining interest in the Plan thereafter.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD BRUCH, et al.	:	CIVIL ACTION
	:	
v.	:	NO. 82-3286
	:	
FIRESTONE TIRE & RUBBER COMPANY, et al.	:	

ORDER

NOW, June 9, 1986, upon consideration of the cross-motions for summary judgment, the memoranda of law submitted by the parties, the oral arguments made by counsel, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED. Judgment is entered in favor of defendants and against plaintiffs as to counts one, three, five, six, and seven.

/s/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD BRUCH, et al.	:	CIVIL ACTION
v.	:	
FIRESTONE TIRE & RUBBER COMPANY, et al.	:	NO. 82-3286

CIVIL JUDGMENT

Before HUYETT, J.

AND NOW, this 9th day of June, 1986, in accordance with the order dated June 9, 1986,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendants and against the plaintiffs as to counts one, three, five, six and seven.

BY THE COURT:

ATTEST: /s/ Francis E. DeVine
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1448

BRUCH, Richard, CHUBB, John R. and SCHADE, Albert and SCHOLLENBERGER, Richard and SMITH, Ronald R. and SMOLINSKI, Leonard A. In their individual capacities and as representatives of the class of former, salaried, non-union employees of the Firestone Plastics Division which was sold to the Hooker Chemical Division of the Occidental Petroleum Corporation,

Appellants

v.

FIRESTONE TIRE AND RUBBER COMPANY and FIRESTONE TIRE & RUBBER COMPANY RETIREMENT PLAN FOR SALARIED EMPLOYEES and FIRESTONE TIRE & RUBBER COMPANY STOCK PURCHASE AND SAVINGS PLAN,

Appellees

(D.C. Civil NO. 82-3286)

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG,

and SCIRICA, *Circuit Judges*, and DUMBAULD, *District Judge*.[1]

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: Sep 25, 1987

1. The Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, as to panel rehearing only.

STATUTES AND REGULATIONS

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA") 29 U.S.C. §§ 1001 et seq.

Section 3, 29 U.S.C. § 1002

§ 1002. Definitions

For purposes of this subchapter:

. . .

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

. . .

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;
(ii) if an administrator is not so designated, the plan sponsor; . . .

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, . . .

. . .

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other

compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Section 4, 29 U.S.C. § 1003

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

Section 104(b), 29 U.S.C. § 1024(b)

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part, an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period, this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement,

trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

Part 4—Fiduciary Responsibility

Section 401(a), 29 U.S.C. § 1101(a)

§ 1101. Coverage

(a) This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than —

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

Section 404(a)(1), 29 U.S.C. § 1104(a)(1)

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances, it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Section 406(b), 29 U.S.C. § 1106(b)

§ 1106. Prohibited transactions

. . .

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Section 408(c), 29 U.S.C. § 1108(c)

§ 1108. Exemptions from prohibited transactions

. . .

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

Section 502(c), 29 U.S.C. § 1132(c)

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters

reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

LABOR MANAGEMENT RELATIONS ACT ("LMRA") 29 U.S.C. §§ 141 et seq.

Section 302, 29 U.S.C. § 186

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; . . .

. . .

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a

trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held

therein cannot be used for any purpose other than paying such pensions or annuities.

LABOR DEPARTMENT REGULATION
29 C.F.R. § 2510.3-3(d)

(d) *Participant covered under the plan.*

(1)(i) An individual becomes a participant covered under an employee welfare benefit plan on the earlier of—

(A) the date designated by the plan as the date on which the individual begins participation in the plan;

(B) the date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or

(C) the date on which the individual makes a contribution to the plan, whether voluntary or mandatory.

(ii) An individual becomes a participant covered under an employee pension plan—

(A) in the case of a plan which provides for employee contributions or defines participation to include employees who have not yet retired, on the earlier of—

(*1*) the date on which the individual makes a contribution, whether voluntary or mandatory, or

(2) the date designated by the plan as the date on which the individual has satisfied the plan's age and service requirements for participation, and

(B) in the case of a plan which does not provide for employee contribution and does not define participation to include employees who have not yet retired, the date on which the individual completes the first year of employment which may be taken into account in determining—

(*1*) whether the individual is entitled to benefits under the plan, or

(2) the amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2)(i) An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual—

(A) is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and

(B) is not designated by the plan as a participant.

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if—

(A) the entire benefit rights of the individual—

(*1*) are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(*2*) a contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) the individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3)(i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service, is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section,

in the case of an employee pension benefit plan which is subject to section 203 of the Act the term "year of service" shall have the same meaning as in section 203(b)(2)(A) of the Act and any regulations issued under the Act and the term "one-year break in service" shall have the same meaning as in section 203(b)(3)(A) of the Act and any regulations issued under the Act.

4

No. 87-1054

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,

v.

RICHARD BRUCH,
ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS BRUCH, SCHADE, SMOLINSKI, et al.

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QUESTIONS PRESENTED

1. Does not ERISA permit a non-deferential standard of review of a benefits denial where the plan administrator has an adverse interest to the claimants?

2. Does not a former employee have standing to request information about plan benefits even though he may not, in fact, be entitled to those benefits?

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No. 87-1054

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS BRUCH, SCHADE, SMOLINSKI, et al.

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking to review the decision of the Court of Appeals for the Third Circuit entered in this case on August 31, 1987, petitioners' request for rehearing having been denied on September 25, 1987.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION REQUIRING NON-DEFERENTIAL REVIEW OF AN ADMINISTRATOR'S DENIAL OF BENEFITS WHERE THE ADMINISTRATOR HAS AN ADVERSE INTEREST TO THE CLAIMANTS DOES NOT CREATE ANY IRRECONCILABLE DIFFERENCE AMONG THE CIRCUITS.

Petitioners seek a writ of certiorari to resolve the conflict in the circuits allegedly created by the Third Circuit's departure from the arbitrary and capricious standard of review (P6).[1] The arbitrary and capricious standard has been the subject of growing skepticism in a number of cases decided prior to the Third Circuit's decision. Some cases purporting to apply the arbitrary and capricious standard actually expanded the scope of review far beyond that normally accorded under the standard, especially where the plan administrator possessed an adverse interest to the claimants. *See, e.g., Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985), and *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152-53 (9th Cir. 1986), where the Ninth Circuit declined to grant the same deference to the determinations of the employer administrator that it would have granted to an independent trustee. Other cases that adhered to the arbitrary and capricious standard added bad faith to the grounds for overturning a denial of benefits. *See, e.g., Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983), and *Allen v. United Mine Workers of America 1979 Benefit & Trust Plan*, 726 F.2d 352, 354 (7th Cir. 1984). Still other cases eliminated virtually all judicial deference to the administrator's decision by expanding the arbitrary and capricious standard to include not only bad faith but whether the decision of the trustees was supported by substantial evidence or was erroneous on a question of law. *See, e.g., Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980); *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 313-14 (5th Cir. 1982); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352-53 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).

A recent Seventh Circuit decision — *Van Boxel v. The Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987) — suggested that the arbitrary and capricious standard has been, in reality, a sliding scale of judicial review, which has been more or less penetrating depending upon the amount of suspicion of partiality. As examples of decisions which have applied this sliding scale standard, although purporting to apply a uniform arbitrary and capricious standard, the court in *Van Boxel* cited *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1148-49 (4th Cir. 1985), and *Dockray v. Phelps Dodge Corp., supra*, 801 F.2d at 1152-53.

Viewed in the context described above, the Third Circuit decision is not inconsistent with the kind of judicial review which has actually been applied by other courts in similar situations; the Third Circuit departs merely from the verbalization of the standard.

Petitioners have criticized the court of appeals for its failure to follow trust law (P9-12). Yet the very foundation of the reasoning of the court below stems from section 187 of the Restatement (Second) of Trusts, which cautions against deference to a trustee's judgment when a conflict of interest threatens the trustee's impartiality (A15). Petitioners have also criticized the court of appeals for rejection of the precedents decided under section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186(c)(5), applying the arbitrary and capricious standard of review to the determinations of trustees of jointly administered benefit funds (P14-17). However, as the court of appeals

1. References to "P" pages are to the Petition.

points out, the procedures required by the LMRA assure the neutrality of the plan administrator, whereas the severance plan at issue in the instant case is (1) unfunded and (2) controlled exclusively by the employer (A14-21).

Judge Posner stated in the *Van Boxel* case:

> Transposed to the ERISA setting, the arbitrary and capricious standard may be inapt, a historical mistake, or a mechanical extrapolation from different settings, at once too lax and too stringent, but even if it is any or all of these things it is saved from doing serious harm by its vagueness and elasticity. *Van Boxel, supra*, 836 F.2d at 1052.

The very vagueness and elasticity of the arbitrary and capricious standard itself has inevitably resulted in the varying degrees of judicial review under ERISA to which petitioners take exception (P12-14).

Petitioners proclaim that:

> This particular case presents the conflict in its starkest form because identically situated employees of the petitioner company have had their benefit claims reviewed by two different circuits with diametrically opposed results (P5).

Petitioners refer to the instant case and to the case of *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987), which upheld the denial of severance benefits under the arbitrary and capricious standard. Given the elasticity and vagueness of the standard itself and the flexibility with which it has been applied, it could just as well be said that identically situated employees of the petitioner company may have their benefit claims reviewed by two different circuits each applying the arbitrary and capricious standard with diametrically opposed results.

Moreover, it is premature to refer to a "result" in the instant case. The court of appeals has not decided the

merits of plaintiffs' claim to severance pay. The court of appeals has merely remanded the matter to the district court with instructions to exercise a non-deferential scope of review and to decide the proper construction of the relevant plan language. Respondents suggest that it makes more sense to allow this case to run its normal course than to engage the resources of this Court in choosing between proliferating verbal distinctions of no real significance.

II. THE COURT OF APPEALS' DECISION THAT A FORMER EMPLOYEE HAS STANDING TO REQUEST INFORMATION UNDER ERISA DOES NO DISSERVICE TO PLAN ADMINISTRATION.

The district court held that plaintiffs were not entitled to request information under ERISA section 502(c), 29 U.S.C. §1132(c), because they were no longer employees and because the district court had just concluded that they were not entitled to plan benefits (A40). On this issue the court of appeals held that a former employee does not lack standing to request information about plan benefits just because it eventually turns out that he is not entitled to those benefits (A41-42). This decision is squarely in accordance with the intent of Congress to arm participants with enough information to enforce their rights. S.Rep. 93-127, 93d Cong. 1st Sess. at 27 (1973). Possible abuses about which petitioners express concern (P19-20) can be controlled by the district court's exercise of the discretion conferred upon it by the statute (A43).

III. CONCLUSION

For the reasons stated in this brief, the court below has done no disservice to the law governing employee benefit plans. The Petition should be denied.

Respectfully submitted,

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No. 87-1054

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,

v.

RICHARD BRUCH,
ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

I. THERE IS A REAL CONFLICT ON THE STANDARD OF REVIEW ISSUE THAT MERITS IMMEDIATE REVIEW BY THIS COURT.

Respondents assert that there is not a true split in the circuits on the issue of the proper standard of review when a plan administrator is alleged to have a conflict of interest. Respondents further claim that review of the issue by this Court is premature because Firestone could still prevail in this case after another round of litigation in the district court and in the Third Circuit. Respondents are wrong on both contentions.

As noted in Firestone's Petition, every other court of appeals applies the arbitrary and capricious standard when the administrator is alleged to have a conflict of interest, while the Third Circuit now requires de novo review. (Petition at 7)

Respondents do not deny that the circuits appear to be in conflict, but they suggest that the apparent conflict reflects mere "verbal distinctions of no real significance." (Brief in Opposition at 5) Drawing on the recent decision in *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1987), respondents assert that the arbitrary and capricious standard as applied is a "sliding scale of review" that requires less deference to the decision of a plan administrator who is alleged to have a conflict of interest. (Brief in Opposition at 2-3)

The very real difference between the sliding scale approach and that adopted by the Third Circuit is best demonstrated by analyzing the district court decision in this case. The district court applied the arbitrary and capricious standard but concluded that "because Firestone avoided the outlay of a substantial amount of money by denying the plaintiffs termination pay, the deference I owe to that decision is reduced, and I may scrutinize the decision more closely." (A53) Applying this "less deference" standard, the district court granted summary judgment in favor of Firestone. (A56) The Third Circuit flatly rejected the district court's analysis, holding that "there should be deference to neither the plan administrator's nor the participants' construction of plan terminology." (A3) The Third Circuit then reversed the district court's decision "because application of that (arbitrary and capricious) standard was outcome determinative." (A28)

Thus, the Third Circuit's rule requiring de novo review and granting *no* deference to the administrator's determination departs from prior cases not only in degree but in kind. Other circuits addressing the identical fact situation have consistently and expressly forbidden the district court to substitute its own interpretation of the plan for the administrator's. *See, e.g., Schwartz v. Newsweek*, 827 F.2d 879, 883 (2d Cir. 1987) ("it was entirely within Newsweek's discretion to interpret [the plan's] concededly ambiguous language as it did. . . . The court may not substitute its judgment for that of

the fiduciary"); *Holland v. Burlington Industries*, 772 F.2d 1140, 1149 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986) ("the denial of severance pay benefits . . . was in fact a perfectly reasonable interpretation of Burlington's severance policy which courts may not replace with an interpretation of their own"); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 627 (6th Cir. 1987) ("it is a fair reading of the plan to require unemployment as a prerequisite to finding that a RIF occurred"); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1150 (6th Cir. 1985) ("courts are extremely reluctant to substitute their judgment for the judgments of the trustees, and will do so only if the actions of the trustees are not grounded on any reasonable basis"); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983) ("this court is bound by the decision of the pension administrator unless [plaintiffs] can establish that it was arbitrary, fraudulent or in bad faith"); *Pabst Brewing Co. v. Anger*, 784 F.2d 338, 338 (8th Cir. 1986) (per curiam) ("it was not unreasonable for Pabst, as plan administrator, to interpret the term 'lay off' as not applying to this set of facts"); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985) ("this Court's role is limited to determining whether [the administrator's] interpretation was made rationally and in good faith—not whether it was right").

Even the "sliding scale" or "less deference" cases cited by respondents expressly provide that the district court may only determine whether the administrator acted reasonably and may not substitute its own interpretation of the plan. *See, e.g., Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1053 (7th Cir. 1987) (requiring only "careful judicial scrutiny to make sure [the administrators'] action was reasonable"); *Jung v. FMC Corp.*, 755 F.2d 708, 712 (9th Cir. 1985) ("the court may not substitute its judgment for that of the trustees"). Again demonstrating that the difference in standards is outcome determinative, the *Jung* court also upheld the grant of summary judgment to an employer who denied

benefits from an unfunded termination pay plan when a business was sold as a going concern.

Respondents also suggest that granting the Petition at this time is unnecessary because Firestone may prevail on remand under de novo review. (Brief in Opposition at 4-5) Respondents ask this Court to ignore the adverse effects that de novo review will have on employer administrators even if their decisions pass muster after such review. A de novo standard of review inevitably will mean the expenditure of more employer (and court) resources to develop the record. These needless costs, together with the threat of having their reasonable decisions second-guessed by the courts, will discourage employers from establishing or expanding the voluntary employee benefit plans governed by ERISA.[1]

Moreover, a result favorable to Firestone after remand to the district court and after a second review by the Third Circuit would effectively insulate from review the erroneous decision that Firestone now challenges. Other plan administrators will be forced to litigate claims under the de novo standard until some court holds that an administrator's decision, although not arbitrary or capricious, does not survive de novo review. Only then could this Court act. In the meantime, the Third Circuit's opinion already is causing confusion in the other circuits. *See, e.g., Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d at 1049-53; *Agee v. Armour Foods Co.*, 834 F.2d 144, 145 (8th Cir. 1987). Delayed review by this Court would only compound this confusion. The question is one of law, the parties developed an adequate record on cross-motions for summary judgment, and the question was treated at length in a detailed opinion by the court of appeals. The issue is now ready for determination by this Court.

1. For example, the Third Circuit held that the district court should interpret the plan at issue by considering not only the language and intent of that plan but also how other employers interpret their benefit plans (even those with different language and intent). (A29)

II. REVIEW BY THIS COURT IS REQUIRED TO RESOLVE A CONFLICT IN THE CIRCUITS ON THE "PARTICIPANT" ISSUE.

In their brief discussion of whether three individual plaintiffs are "participants" entitled to discretionary damages under section 502(c) of ERISA, respondents fail to acknowledge the conflict discussed by Firestone between the Third Circuit's decision and those of three other circuits (*see* Petition at 18-19). Instead, relying on an isolated statement in the legislative history, respondents merely assert that the Third Circuit's construction of the statute furthers Congress' purpose of arming "individual participants and beneficiaries . . . with enough information to enforce their own rights." *See* S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863 (cited in Brief in Opposition at 5). This assertion proves nothing because it assumes that plaintiffs are "participants" within the meaning of the statute, the very question at issue. That question must be answered in the negative in light of the language and intent of ERISA (*see* Petition at 19) and the Department of Labor's regulations (*see id.* at 21).

CONCLUSION

For the reasons discussed in the Petition and in this Reply Brief, the Court should grant the Petition to reconcile the intercircuit conflicts on the two important issues presented by this case.

Respectfully submitted,

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No. 87-1054

In The
Supreme Court of the United States

October Term, 1987

The Firestone Tire & Rubber Co., *et al.*,
Petitioners,
v.
Richard Bruch, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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OCTOBER TERM, 1987

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST

With the written consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") and the National Association of Manufacturers of the United States of America ("NAM") respectfully submit this brief as *amici curiae* in support of the Petitioners. The Chamber is the nation's largest federation of businesses, representing more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade and professional associations and state and local

[1] The consent letters have been filed with the Clerk of this Court.

chambers of commerce. The NAM is a voluntary business association of over 13,000 companies, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. Both the Chamber and the NAM regularly advocate their members' views in court on issues of national concern to the business community.

In the decision below, the Third Circuit held that the traditional "arbitrary and capricious" standard of review is too lenient for courts to apply when examining benefit denials by employer-administrators of ERISA benefit plans. Recognizing that nine other circuit courts apply the arbitrary and capricious standard, the Third Circuit nonetheless held that such deference is inappropriate where the benefit plan is administered by a trustee who is alleged to have a conflict of interest. For example in the case below, the employer was alleged to have such a conflict because it administered an unfunded plan under which benefits were paid from the employer's general assets. Benefit denials in such circumstances, the court held, are subject to *de novo* judicial review.

The vast majority of pension plans are single employer plans, and many of these are administered in-house.[2] Further, there are literally millions of welfare plans providing unfunded benefits, such as severance pay, the majority of which also are administered in-house.[3] Both the Chamber's and the NAM's membership include many companies which maintain their own pension and welfare benefit plans, many of which are employer-administered or unfunded. The Third Circuit's decision

[2] According to Labor Department figures, of the almost 750,000 private pension plans in operation in 1974, some 745,000 of them, or over 99%, were single employer plans. *See* p. 5, *infra*.

[3] *See* Petition for Cert. at 8 n.8.

not only would institute a drain on plan assets by requiring continuous *de novo* litigation of claim denials, but also would overload the judiciary and contravene the enenforcement scheme Congress established in ERISA.

Because the Third Circuit's holding creates a split in the circuits, contradicts the reasoning of this Court, contravenes congressional intent, and would impose a substantial burden on employer-administered benefit plans, the Chamber and the NAM urge this Court to grant review.

INTRODUCTION

This ERISA class action arose out of Firestone Tire and Rubber Company's sale of five of its plants, as ongoing operations, to Occidental Petroleum Corporation. Four classes of salaried Firestone employees alleged that, although they continued employment with Occidental without interruption following the sale of the plants, they were entitled to various benefits from Firestone.[4] The employees challenged the denial by Firestone, as administrator of its benefit plans, of their eligibility for these benefits.

The U.S. District Court for the Eastern District of Pennsylvania found that Firestone's denial of benefits was neither arbitrary nor capricious, and therefore granted the company summary judgment.[5] On appeal, the U.S. Court of Appeals for the Third Circuit reversed,

[4] The employees claimed to be eligible for: (1) termination pay; (2) the difference between early retirement benefits and deferred vested retirement benefits; (3) vesting of their unvested interests in Firestone's contributions to its stock plan; and (4) credit for unused vacation for vesting purposes. Certain individual employees also claimed monetary relief for alleged violations of ERISA's disclosure requirements. 828 F.2d at 136-37.

[5] *Bruch* v. *Firestone Tire & Rubber Co.*, 640 F. Supp. 519 (E.D. Pa. 1986). The district court also refused to award discretionary damages pursuant to 29 U.S.C. § 1132(c) for Firestone's alleged violations of ERISA's disclosure requirements. *Id.* at 533-35.

holding that the district judge had erred in applying the deferential "arbitrary and capricious" standard of review to Firestone's denial of termination pay.[6]

While it noted that nine circuit courts apply the arbitrary and capricious standard of review when considering challenges to plan administrators' benefit denials, the Third Circuit held that such deference is inappropriate when the administrator is alleged to have a conflict of interest, regardless of whether there is evidence that the administrator violated any of ERISA's stringent anti-conflict provisions. The court concluded: "the arbitrary and capricious standard should be applied only when the trustee is choosing among beneficiaries; when one of the *possible* beneficiaries of the trustee's decision is the trustee himself, this degree of deference is inappropriate." [7] (emphasis added).

It is this holding which Firestone urges this Court to review, and the Chamber and the NAM support Firestone's petition for a writ of *certiorari.*

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION CREATES A SPLIT IN THE CIRCUITS AND, IF UPHELD, WILL WREAK HAVOC ON EMPLOYER-ADMINISTERED BENEFIT PLANS AND OVERLOAD FEDERAL DISTRICT COURTS.

The Third Circuit's decision creates a split in the circuit courts. As the Third Circuit recognized in its holding below, "the clear weight of authority under ERISA" is against its position. 828 F.2d at 138. Indeed, every

[6] *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *reh'g denied* (3d Cir. Sept. 25, 1987). The Third Circuit also affirmed the summary judgment for Firestone on two matters not at issue here: the employees' claims for early retirement benefits and vesting of stock plan contributions.

[7] 828 F.2d at 138 n.5.

single circuit court other than the Third Circuit has applied the arbitrary and capricious standard of review to challenges of plan administrators' benefit denials.[8] The Third Circuit's refusal to join in this consistent application of the standard creates an intolerable uniformity problem. Final resolution by this Court is essential.

The Third Circuit's ruling and the resulting split in the circuits place an enormous burden on the federal courts and the administrators of ERISA benefit plans. According to recent unpublished Labor Department figures, there were nearly 750,000 single employer pension plans as of 1984,[9] many of which were self-administered. There also were over four million welfare plans, most of which also were employer-administered.[10] Under the Third Circuit's decision, every denial of benefits under one of these plans by an employer-administrator who is alleged to have a financial interest in benefit payment would be subject to *de novo* judicial review. A routine judicial determination of, for example, whether severance pay was properly denied after the sale of a facility would become a detailed inquiry into the provisions of the plan

[8] In addition to the cases cited by the Third Circuit (from the 2d, 4th, 5th, 6th, 8th, 9th, 11th, and D.C. Circuits), 828 F.2d at 138, *see Rueda* v. *Seafarers Int'l Union of North America*, 576 F.2d 939, 942 (1st Cir. 1978); *Pokratz* v. *Jones Dairy Farm*, 771 F.2d 206, 208 (7th Cir. 1985); and *Murn* v. *United Mine Workers of America 1950 Pension Trust*, 718 F.2d 359, 361-62 (10th Cir. 1983). Four of the cases cited by the Third Circuit (from the 4th, 6th, 8th, and 11th Circuits), involved company-administered, unfunded plans. In addition, three other circuits (two of which were cited by the Third Circuit) also have applied the arbitrary and capricious standard to company-administered, unfunded plans. *See Schwartz* v. *Newsweek*, 827 F.2d 879 (2d Cir. 1987); *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983); and *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985).

[9] See Table A, attached. The Labor Department's source for this figure is the 1984 Form 5500 series reports filed with the Internal Revenue Service.

[10] Pension & Welfare Administration, U.S. Dept. of Labor, *ERISA 1986 Report to Congress* i.

and the facts of each employee's separation, rather than a determination of whether the administrator's interpretation was reasonable.[11]

Such detailed judicial intervention would wreak havoc with ERISA's enforcement scheme. The federal district courts have neither the time nor the expertise to delve into the facts of every benefit denial by every employer. As the Fourth Circuit stressed in *Holland* v. *Burlington Industries, Inc*,[12] "[w]here claim eligibility is involved, it is necessary to ensure that primary responsibility rests with *administrators* 'whose experience is daily and continual, not with judges whose exposure is episodic and occasional . . . .' " (emphasis added).

Apart from overloading the judiciary, constant litigation over the details of each benefit claim would be extremely expensive and time-consuming for the parties. Continuously defending administrators' eligibility determinations would present a significant financial strain on the plan. Using outside plan administrators in an effort to avoid this problem would be costly and inefficient. Outside administrators have neither ready access to company records nor the institutional memory that comes from years of administering a plan. Creating duplicate data for outside administrators is an expensive and time-consuming process. Such persistent drains on plan assets were not envisioned by Congress and are not required by the law.

[11] Firestone has litigated its denial of severance pay after sales of facilities at least three times, not counting the instant action. In those cases, the courts simply examined the denials for arbitrariness or capriciousness, and did not conduct *de novo* review. *See Adcock* v. *Firestone Tire & Rubber Co.*, 616 F. Supp. 409 (M.D. Tenn. 1985), *aff'd in relevant part*, 822 F.2d 623 (6th Cir. 1987); *Davidson* v. *Firestone Tire & Rubber Co.*, No. 84-1215 (W.D. Tenn. May 30, 1986); *Sisk* v. *Firestone Tire & Rubber Co.*, No. 83-CV-1448-DT (E.D. Mich. Sept. 19, 1986).

[12] 772 F.2d 1140, 1148 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 3271 (1986).

Finally, the Third Circuit's holding, if allowed to stand, will destroy uniformity in the enforcement of ERISA. Many pension plans (including those of the Chamber and the NAM) serve participants located in several judicial circuits.[13] Application of different standards of review in different circuits would be confusing and inequitable, and would lead to forum-shopping. In cases (like the instant case) where an eligibility determination is to apply to a class of participants, there could be a race to the courthouse, with participants seeking the Third Circuit to obtain *de novo* review and the employer seeking some other circuit. Entitlement to benefits under ERISA must not depend on choice of forum.

Indeed, uniformity in ERISA administration was an important legislative goal.[14] Congress specifically sought to address the fact that in the benefits area, "decisions under the same set of facts may differ from state to state." [15] Thus, the Act was to foster a "uniformity of decision" to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." [16] The Third Circuit's decision would create a "necessity of reference" to varying *circuit* laws on deference.

The Third Circuit's decision would also require the application of differing scopes of review depending on whether the plan administrator could be alleged to have a conflict of interest. This is not in keeping with the consistent administration of ERISA plans contemplated by

[13] In the instant litigation, Firestone sold five plants which were located in three judicial circuits.

[14] *See*, p. 12, *infra*.

[15] H. Rep. No. 533, 93d Cong., 1st Sess. 4639, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4650; S. Rep. No. 127, 93d Cong., 2d Sess. 4838, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4865 (identical language).

[16] *Id.*

Congress. As one circuit court noted, "[t]o vary the standard of judicial review for general asset [unfunded] welfare plans would only sow confusion in ERISA, which we decline to do . . . ." *Holland* v. *Burlington Industries, Inc.*, 772 F.2d at 1148.

II. THE THIRD CIRCUIT'S HOLDING CONFLICTS WITH THE REASONING OF THIS COURT AND CONTRAVENES CONGRESSIONAL INTENT.

In *NLRB* v. *Amax Coal Co.*,[17] this Court rejected the notion that management-appointed fiduciaries of employee benefit plans are agents of their appointing employer, and may be expected to administer the plan in such a way as to advance the employer's interests. Rather, the Court held, "the fiduciary requirements of ERISA specifically *insulate* the trust from the employers' interest." [18] By imposing strict limitations on fiduciaries' conduct, the Court noted, ERISA ensures that they act solely in the interest of plan participants and beneficiaries.[19]

Once again in *Massachusetts Mutual Life Insurance Co.* v. *Russell*,[20] this Court refused to give weight to the fact that "the fiduciaries administering [the company]'s employee benefit plans [were] high-ranking company officials . . . ." Instead, the Court pointed to the strict fiduciary duties of care and loyalty ERISA imposes on plan administrators and the protections they establish for participants and beneficiaries.[21]

[17] 453 U.S. 322 (1981).

[18] *Id.* at 333 (emphasis added).

[19] *Id.* at 332-33.

[20] 473 U.S. 134, 136 (1985).

[21] *Id.* at 142-43 & n.10. *Massachusetts Mutual* primarily concerned the availability of a private right of action and extra-contractual damages for improper processing of benefit claims, but its treatment of the implicit allegation of bias is instructive here.

Ignoring these decisions and the explicit fiduciary standards ERISA establishes, the Third Circuit below concluded that employer-administered benefit plans are subject to "significant danger that the plan administrator will not be impartial." 828 F.2d at 144. This danger is particularly acute, the court held, when the benefits at issue are unfunded, for then, "every dollar saved by the administrator on behalf of his employer is a dollar in [the employer]'s pocket." *Id.*

This reasoning evidences the same error the Third Circuit committed in *Amax Coal*, and warrants the same kind of correction by this Court. The Third Circuit simply does not trust the fiduciary to fulfill its statutory duty to act solely in the interest of plan participants and beneficiaries, or the provisions of ERISA to redress any violation of this duty. Instead, the Third Circuit creates a *presumption* that the fiduciary will favor the interest of the company over that of the employee, and refuses to accord deference to its eligibility determinations. The *Amax Coal* Court rejected such a pre-judgment of bias, and this Court must reject it again here because it contravenes the enforcement scheme contemplated by ERISA.

Congress intended to cast employee benefit plans in the traditional trust form "precisely because fiduciary standards long established in equity would best protect the employee beneficiaries." *Amax Coal*, 453 U.S. at 331. Accordingly, Congress codified in ERISA the fiduciary standards fundamental to this traditional trust form:[22] fiduciaries are alleged to act solely in the interest of plan participants and beneficiaries [23] and for the exclusive

[22] *See* H. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649 ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts."); S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4865 (identical language).

[23] 29 U.S.C. 1104(a)(1) (1982).

purpose of providing them benefits;[24] to act with the care, skill, prudence and diligence of the traditional "prudent man;"[25] to prevent other fiduciaries from breaching their duties;[26] and to abstain from involvement in any transactions in their own interest or adverse to the interest of the plan.[27] Fiduciaries are subject to personal liability for breach of any of these duties,[28] and any participant or beneficiary may bring a civil action to redress violation of any of these provisions.[29] These comprehensive fiduciary obligations, which have been described as "the highest known to the law,"[30] severely restrict administrators' conduct and fully protect plan participants and beneficiaries against any wrongdoing.

There is no indication in ERISA or its legislative history that Congress intended for courts to become enmeshed in the day-to-day determinations of benefit eligibility on a *de novo* basis. To the contrary, Congress vested trustees with "exclusive authority and discretion to manage and control the assets of the plan,"[31] and specifically provided that an officer, employee, or agent or other representative of a sponsoring employer can serve as a plan fiduciary.[32] The additional requirements that plans provide written notice of benefit denials to disap-

[24] 29 U.S.C. § 1104(a)(1)(A) (1982).

[25] 29 U.S.C. § 1104(a)(1)(B) (1982).

[26] 29 U.S.C. § 1105(a) (1982).

[27] 29 U.S.C. § 1106(b) (1982).

[28] 29 U.S.C. § 1109(a) (1982).

[29] 29 U.S.C. § 1132(a)(3) (1982).

[30] *See Donovan* v. *Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1468 (5th Cir. 1986), *quoting Donovan* v. *Bierwirth*.

[31] 29 U.S.C. § 1103(a) (1982).

[32] 29 U.S.C. § 1108(c)(3) (1982).

pointed claimants with reasons therefor, and afford a reasonable opportunity for a "full and fair review by the appropriate named fiduciary of the decision denying the claim"[33] ensure procedural fairness in fiduciaries' disposition of claims.[34]

These duties and obligations weigh as heavily on company-administrators as on outside or joint (company and union) administrators. Therefore, there is no basis for the Third Circuit's attempt to create a no-deference rule solely for company-administered plans. By providing that company officials can serve as plan fiduciaries,[35] Congress manifested its belief that the fiduciary duties embodied in ERISA would protect plan participants against pro-company bias in employer-administered plans. The Third Circuit's attempt to institute what it considers to be additional protections impermissibly alters the legislative scheme.

As the lower courts have recognized, although Congress allowed an employer to serve as administrator of its pension plan, the fiduciary obligations it imposed under ERISA are not diminished by this dual role.[36] Indeed, the Third Circuit itself has noted as much.[37] Thus,

[33] 29 U.S.C. § 1133 (1982).

[34] In addition, the Pension and Welfare Benefit Administration has promulgated regulations regarding claim procedures which establish *further* standards governing fiduciaries' conduct. Every employee benefit plan must establish and publicize in its summary plan description a "reasonable" claims procedure, including a claim filing mechanism, a notification mechanism (within 90 days), minimum notification contents, and a "full and fair" review procedure for denials of claims. 29 C.F.R. § 2560.503-1 (1987).

[35] 29 U.S.C. § 1108(c)(3) (1982).

[36] *See Sutton* v. *Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Donovan* v. *Bierwirth*, 680 F.2d at 271 (employer-administrators' decisions "must be made with an eye single to the interests of the participants and beneficiaries").

[37] *See McMahon* v. *McDowell*, 794 F.2d 100, 110 (3d Cir. 1986) ("while a plan fiduciary does not violate ERISA merely by being

while an employer-administrator "wears two hats,[38] actions taken in its capacity as fiduciary are governed by the statutory fiduciary standards. The Third Circuit's treatment of employer-administrators as second class fiduciaries is unjustifiable; employer-administrators bear full fiduciary responsibilities, and their authority must not be circumscribed by the judicial presumption that they have acted in the interest of the company.

Finally, Congress did not intend for decisions regarding unfunded benefits to be treated differently from those regarding funded benefits. While the Senate bill did not subject unfunded plans to fiduciary standards,[39] the House bill did,[40] as did the statute Congress ultimately enacted.[41] Further, both houses addressed their desire to "bring a measure of uniformity" to ERISA enforcement.[42] Imposing separate rules for decisions regarding funded and unfunded benefits would directly contravene this objective.

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associated also with the employer, Section 408 [29 U.S.C. § 1108] does not sanction any derogation from the strict requirements of Section 404 [29 U.S.C. § 1104]").

[38] *Cuhna* v. *Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986), *quoting Amato* v. *Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984), *aff'd in part, rev'd in part,* 773 F.2d 1402, 1417 (2d Cir. 1985), *cert. dismissed,* 106 S. Ct. 1167 (1986).

[39] *See* S. Rep. No. 127, 93 Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4866.

[40] *See* H. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4650.

[41] *See* 29 U.S.C. § 1104(a)(1) (1982). *See also* H. Conf. Rep. No. 1280, 93 Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5076-77.

[42] H. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4650; S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4865.

Congress carefully considered the varying pulls on administrators' loyalties,[43] and protected beneficiaries' interests with explicit statutory safeguards. For example, the statute "prohibit[s] a fiduciary from dealing with the plan assets on his own account, receiving consideration from other parties dealing with the plan, and acting on behalf of a person adverse to the plan." [44] The law does not stigmatize an employer-administrator's decision regarding the payment of benefits, as long as the carefully-drawn fiduciary responsibilities of ERISA are satisfied. The Third Circuit's holding allowing the courts to comprehensively review and second-guess employer-administrators' decisions ignores this legislative balance and defeats congressional intent. Review by this Court is essential to prevent this outcome.

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[43] *See, e.g.,* Staff of Joint Comm. on Internal Revenue Taxation, 93d Cong., 2d Sess., Tax Treatment of Pension Plans, Part One 49 (Comm. Print 1973) ("An employer, needing working capital or in a bad financial condition, may forego a [tax] deduction in order to divert trust assets to his own use, and the trust fiduciary may acquiesce in his demand."); S. Rep. No. 383, 93d Cong., 2d Sess. 31, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4916 ("Unfortunately, instances have arisen in which pension funds have been used improperly by plan managers and fiduciaries.").

[44] H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5076; *id.* at 5075.

CONCLUSION

The fundamental purpose of employee benefit plan administrators is to make benefit determinations and to manage assets. It is unreasonable to assume that Congress intended courts to second-guess plan administrators by subjecting their decisions to *de novo* review. For the reasons stated above, the Chamber and the NAM respectfully urge this Court to grant Firestone's petition for a writ of *certiorari*.

Respectfully submitted,

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January 22, 1988

TABLE A

Table 2. Number of private pension plans by type of plan entity, type of plan and number of participants size class, 1984

Number of participants	Total plans			Single employer plans [1]			Multiemployer plans [2]		
	Total	Defined benefit	Defined contri-bution	Total	Defined benefit	Defined contri-bution	Total	Defined benefit	Defined contri-bution
Total	748,423	215,840	532,583	745,417	213,565	531,852	3,006	2,275	731
None	25,164	9,615	15,549	25,126	9,584	15,542	38	31	7
1-9	494,114	131,563	362,551	494,114	131,563	362,551	—	—	—
10-24	106,783	25,277	81,506	106,783	25,277	81,506	—	—	—
25-29	47,943	13,570	34,373	47,899	13,539	34,359	44	31	14
50-99	28,928	10,712	18,216	28,717	10,561	18,156	211	151	60
100-249	20,415	10,021	10,394	19,961	9,705	10,256	454	316	138
250-499	9,906	5,751	4,155	9,387	5,370	4,017	519	381	138
500-999	6,223	3,951	2,272	5,683	3,546	2,137	540	405	135
1,000-2,499	4,941	3,072	1,869	4,312	2,597	1,715	629	475	154
2,500-4,999	1,936	1,131	805	1,670	918	752	266	213	53
5,000-9,999	1,055	615	440	903	482	421	152	133	19
10,000-19,999	535	302	233	452	227	225	83	75	8
20,000-49,999	344	181	163	300	142	158	44	39	5
50,000 or more	136	79	57	110	53	57	26	26	—

[1] Includes single employer plans, plans of controlled groups of corporations and multiple-employer noncollectively bargained plans.

[2] Includes multiemployer plans and multiple-employer collectively bargained plans.

SOURCE: 1984 Form 5500 series reports filed with the Internal Revenue Service.

No. 87-1054

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,

v.

RICHARD BRUCH, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED DECEMBER 23, 1987
CERTIORARI GRANTED APRIL 4, 1988**

INDEX

The Joint Appendix has been paginated consecutively to the Appendix to the Petition for Certiorari and does not include the items below because they appear in the Appendix to the Petition as follows:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 29, 1982 (No. 1): Plaintiffs' original complaint filed.

September 30, 1982 (No. 6): Defendants' motion for a more definite statement filed.

November 12, 1982 (No. 8): Plaintiffs' amended complaint filed.

November 16, 1982 (No. 9): Plaintiffs' first request to defendants for production of documents filed.

November 22, 1982 (No. 10): Defendants' answer to amended complaint filed.

December 14, 1982 (No. 12): Plaintiffs' first set of interrogatories to defendants filed.

December 15, 1982 (No. 13): Defendants' response to plaintiffs' first request for production of documents filed.

January 28, 1983 (No. 15): Defendants' objections and answers to plaintiffs' first set of interrogatories filed.

February 8, 1983 (No. 16): Plaintiffs' second set of interrogatories to defendants filed.

February 8, 1983 (No. 17): Defendants' notice of the deposition of Ronald R. Smith, et al.

February 24, 1983 (No. 20): Defendants' first request for production to Richard Bruch filed.

February 24, 1983 (No. 21): Defendants' first request for production to Albert Schade filed.

February 24, 1983 (No. 22): Defendants' first request for production to Richard Schollenberger filed.

February 24, 1983 (No. 23): Defendants' first request for production to Ronald Smith filed.

February 24, 1983 (No. 24): Defendants' first request for production to Leonard Smolinski filed.

March 10, 1983 (No. 33): Defendants' objections and answers to plaintiffs' second set of interrogatories filed.

March 17, 1983 (No. 36): Plaintiffs' response to defendants' first request for production filed.

May 3, 1983 (No. 39): Plaintiffs' third set of interrogatories filed.

May 4, 1983 (No. 40): Plaintiffs' second request to defendants for production of documents filed.

June 3, 1983 (No. 43): Defendants' objections and responses to plaintiffs' second request for production filed.

July 7, 1983 (No. 45): Plaintiffs' motion to file second amended complaint filed.

July 13, 1983 (No. 46): Deposition of Thomas Robinson filed.

July 25, 1983 (No. 48): Defendants' memorandum in opposition to plaintiffs' motion for leave to file second amended complaint filed.

August 9, 1983 (No. 49): Plaintiffs' reply memorandum in support of motion to file second amended complaint filed.

August 15, 1983 (No. 50): Affidavit of Robert Ried regarding the answering of plaintiffs' second set of interrogatories filed.

August 17, 1983 (No. 52): Plaintiffs' supplemental memorandum in support of motion to file second amended complaint filed.

December 20, 1983 (No. 45): Order granting plaintiffs leave to file second amended complaint entered.

December 20, 1983 (No. 45): Plaintiffs' second amended complaint filed.

January 31, 1984 (No. 54): Defendants' answer to plaintiffs' second amended complaint filed.

June 6, 1984 (No. 57): Plaintiffs' motion to permit count II of second amended complaint to be maintained on behalf of class filed.

June 28, 1984 (No. 58): Defendants' memorandum in opposition to plaintiffs' motion to permit count II of second amended complaint to be maintained on behalf of class filed.

August 2, 1984 (No. 60): Order approving class action stipulation no. 1 entered.

September 5, 1984 (No. 62): Order denying plaintiffs' motion to permit count II to be maintained on behalf of class entered.

October 3, 1985 (No. 67): Stipulation dismissing (without prejudice) count II and count IV of the second amended complaint filed.

October 25, 1985 (No. 68): Defendants' motion for summary judgment filed.

October 25, 1985 (No. 69): Plaintiffs' motion for summary judgment filed.

December 6, 1985 (No. 70): Plaintiffs' memorandum in opposition to defendants' motion for summary judgment filed.

December 6, 1985 (No. 71): Defendants' memorandum in opposition to plaintiffs' motion for summary judgment filed.

December 20, 1985 (No. 72): Reply memorandum in support of defendants' motion for summary judgment filed.

December 20, 1985 (No. 73): Reply memorandum in support of plaintiffs' motion for summary judgment filed.

April 30, 1986 (No. 76): Argument on summary judgment motions before Huyett, D.J.

June 9, 1986 (No. 77): Memorandum and order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment filed.

June 9, 1986 (No. 77): Judgment entered in favor of defendants and against plaintiffs as to counts I, III, V, VI, and VII.

July 8, 1986 (No. 78): Plaintiffs' notice of appeal filed.

July 8, 1986 (No. 79): Copy of clerk's notice to the United States Court of Appeals for the Third Circuit filed.

August 29, 1986: Brief for appellants and appendix filed.

September 29, 1986: Brief for appellees filed.

October 10, 1986: Reply brief for appellants filed.

December 19, 1986: Argument before Higginbotham and Becker, C.JJ., and Dumbauld, D.J.

January 2, 1987: Letter issued to counsel directing that letter memoranda addressing specific questions be filed.

January 14, 1987: Appellants' letter memorandum filed.

January 23, 1987: Appellees' letter memorandum filed.

August 31, 1987: Opinion affirming summary judgment with respect to counts III and V and reversing summary judgment with respect to counts I and VII filed.

September 14, 1987: Appellees' petition for rehearing and rehearing in banc filed.

September 25, 1987: Order denying appellees' petition for rehearing and rehearing in banc entered.

September 30, 1987: Appellees' motion to stay mandate filed.

October 1, 1987: Order granting appellees' motion to stay mandate entered.

October 16, 1987: Appellees' motion for further stay of mandate filed.

October 21, 1987: Order granting appellees' motion for further stay of mandate entered.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD BRUCH, et al., Plaintiffs	:	CIVIL ACTION NO. 82-3286
v.	:	
FIRESTONE TIRE & RUBBER COMPANY, et al., Defendants	:	

SECOND AMENDED COMPLAINT—CLASS ACTION

This is an action by former, salaried, non-union employees of the Firestone Tire & Rubber Company (hereinafter "Firestone") on their own behalf and on behalf of the class they represent pursuant to Section 502 of the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1132 *et seq.* (hereinafter "ERISA"). Plaintiffs and the class they represent seek to recover employee benefits due them under the terms of the Firestone Tire & Rubber Company Retirement Plan for Salaried Employees (hereinafter "the Retirement Plan"), the Firestone Tire & Rubber Company Stock Purchase and Savings Plan (hereinafter "the Stock Purchase Plan"), and the Firestone Tire & Rubber Company Basic Termination Pay Plan and/or Reduction-in-Force Termination Pay Plan (hereinafter "the Termination Pay Plans"), to enforce their rights under the terms of these Plans, and to clarify their rights to future benefits under the terms of these Plans. The plaintiffs seek the monetary relief provided by Section 502(c) of ERISA, 29 U.S.C. §1132(c), for the refusal and failure of the respective Plan Administrators of the Termination Plans, the Retirement Plan, and the Stock Purchase Plan to furnish them with information to which they are entitled under ERISA. The plaintiffs also seek their attorney's fees and costs of this action under Section 502(g) of ERISA, 29 U.S.C. §1132(g).

I. JURISDICTION AND VENUE

1. Jurisdiction of this Court is based upon 28 U.S.C.

§1331(a) (federal question); 28 U.S.C. §1332(a) (1) (diversity of citizenship); 29 U.S.C. §1132(a)(1)(A) and (B), (a)(3), (a)(4), (c), (d)(1), (e)(1), (f), and (g) (Employee Retirement Income Security Act of 1974). Jurisdiction over the claims arising under the Termination Pay Plans is based on the above statutory provisions and, in the alternative, on the doctrine of pendent jurisdiction.

2. Venue lies in this district under 28 U.S.C. §1391(b) and (c) and 29 U.S.C. §1132(e)(2).

II. PARTIES

3. Plaintiff Richard Bruch is an individual residing at R.D. 2, Evans Road, Pottstown, Pennsylvania, 19464.

4. Plaintiff John R. Chubb is an individual residing at R.D. 4381, Fleetwood, Pennsylvania, 19522.

5. Plaintiff Albert Schade is an individual residing at 1039 Mulberry Street, Reading, Pennsylvania, 19604.

6. Plaintiff Richard Schollenberger is an individual residing at R.D.1, Box 278, Pottstown, Pennsylvania, 19464.

7. Plaintiff Ronald R. Smith is an individual residing at 1431 Maple Street, A 7, Pottstown, Pennsylvania, 19464.

8. Plaintiff Leonard A. Smolinski is an individual residing at 1154 North 11th Street, Reading, Pennsylvania, 19604.

9. All of the plaintiffs are former, salaried, non-union employees who worked in the Pottstown, Pennsylvania plant of the defendant Firestone's Plastics Division prior to and during the sale of the Plastics Division to the Hooker Chemical Division of the Occidental Petroleum Corporation (hereinafter "Occidental"). Plaintiffs sue individually and as representatives of the class of former, salaried, non-union employees who worked in the five plants that comprised the Plastics Division of Firestone, which the defendant sold to Occidental on or about November 30, 1980. All plaintiffs herein named, and the members of the class they represent, are presently, or were, prior to their termination of employment by defendant Firestone through the sale of the Plastics Division, participants in defendant Firestone's Retirement Plan, Stock Purchase Plan, and/or Termination Pay Plans.

10. Defendant Firestone Tire & Rubber Company is a corporation organized and existing under the laws of the State of Ohio with its principal place of business at 1200 Firestone Parkway, Akron, Ohio, 44317. Defendant Firestone is also the Plan Administrator of its Termination Pay Plans, Retirement Plan, and Stock Purchase Plan, and a named fiduciary of such Plans within the meaning of ERISA.

11. Defendant Firestone Tire & Rubber Company Retirement Plan for Salaried Employees is an employee pension plan within the meaning of §3(2) of ERISA, 29 U.S.C. §1002(2), which is designed to provide pension benefits to certain employees of defendant Firestone. The Retirement Plan is a defined benefit pension plan which is qualified for favorable tax treatment under 26 U.S.C. §401 *et seq.* of the Internal Revenue Code. Defendant Retirement Plan is administered by the defendant Firestone and by a Pension Board appointed by the Board of Directors of the defendant Firestone pursuant to the terms of the Plan. The principal office of the Retirement Plan is at 1200 Firestone Parkway, Akron, Ohio, 44317.

12. Defendant Firestone Tire & Rubber Company Stock Purchase and Savings Plan is designed to provide monetary benefits to certain employees of defendant Firestone through the purchase and sale of its corporate stock. The Stock Purchase Plan is a defined contribution plan which is qualified for favorable tax treatment under 26 U.S.C. §401 *et seq.* of the Internal Revenue Code. Defendant Stock Purchase Plan is administered by the defendant Firestone and by a Committee appointed by the Board of Directors of defendant Firestone. The principal office of the Stock Purchase Plan is at 1200 Firestone Parkway, Akron, Ohio, 44317. Defendant Stock Purchase Plan is either an employee welfare benefit plan

within the meaning of §3(1) of ERISA, 29 U.S.C. §1002(1), or an employee pension benefit plan within the meaning of §3(2) of ERISA, 29 U.S.C. §1002(2).

13. Defendant Firestone Tire & Rubber Company Termination Pay Plans are designed to provide severance benefits to certain employees of defendant Firestone. Defendant Termination Pay Plans are either employee welfare benefit plans within the meaning of §3(1) of ERISA, 29 U.S.C. §1002(1), or employee pension benefit plans within the meaning of §3(2) of ERISA, 29 U.S.C. §1002(2). Defendant Termination Pay Plans are administered by defendant Firestone's Corporate Personnel Department. The principal office of the Corporate Personnel Department is at 1200 Firestone Parkway, Akron, Ohio, 44317.

III. THE CLASS ACTION ALLEGATIONS

14. In addition to their individual claims, the plaintiffs named above bring this action as a class action pursuant to Rule 23(a) and Rule 23(b)(1) and/or 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of all former, salaried, non-union employees who worked in the five plants that comprised Firestone's Plastics Division in Pottstown, Pennsylvania, West Caldwell, New Jersey, Perryville, Maryland, Salisbury, Maryland, and Baton Rouge, Louisiana, prior to and during the sale of the Plastics Division by defendant Firestone to Occidental on or about November 30, 1980 (hereinafter referred to as "the class").

15. Each member of the class was a participant in at least one of the benefit plans referred to in paragraphs 9 through 13 above.

16. The class is so numerous that joinder of all members is impracticable. Plaintiffs have reason to believe that the class comprises approximately 1,000 members.

17. There are questions of law or fact common to the class. See, *e.g.*, paragraphs 20 and 22 below.

18. The claims or defenses of the representative parties are typical of the claims or defenses of the class. See paragraphs 20, 22, and 27 *ff.* below.

19. Plaintiffs can and do undertake honorably to represent the class and will fairly and adequately protect the interests of the class, and retained counsel have experience in this type of litigation.

20. There are questions of law or fact common to the class which predominate over any questions affecting only individual members, *i.e.*, whether or not Firestone's sale of its Plastics Division triggered an obligation to pay benefits to the various class members which defendant has failed to honor, as described in paragraphs 27 *ff.* below.

21. The prosecution of separate actions by individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

22. Because defendant Firestone has a single, uniform salaried personnel policy and program which establishes termination benefits and termination procedures for all salaried employees in its Firestone Salaried Personnel Manual, which is administered centrally by its Corporate Personnel Department in Akron, Ohio, and because the single transaction of the sale of defendant Firestone's Plastics Division to Occidental terminated the employment of all members of the class, and such termination gives rise to all claims by members of the class, a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV. FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

23. On and before November 30, 1980, and for many years theretofore, defendant Firestone owned and maintained five plants which comprised its Plastics Division, in Pottstown, Pennsylvania, West Caldwell, New Jersey, Perryville, Maryland, Salisbury, Maryland, and Baton Rouge, Louisiana. Each plaintiff and each member of the class was a salaried, non-union employee of defendant Firestone at one of said plants in defendant Firestone's Plastics Division on and prior to November 30, 1980, and was a participant in one or more of the employee benefit plans which are referred to herein.

24. On or about November 30, 1980, the plants in the Plastics Division of the defendant Firestone were sold to Occidental.

25. The sale of the five plants in the Plastics Division to Occidental caused the termination of the employment relationship between plaintiffs and defendant Firestone.

26. Following the sale of the Plastics Division to Occidental, most, if not all, of the plaintiffs were employed by Occidental. Plaintiffs are advised by defendant Firestone that such employment by Occidental was the result of defendant Firestone's negotiations for the sale of the Plastics Division whereby Firestone agreed to use its best efforts, for a period of six months after the sale, to cooperate, at Occidental's request, in any reasonable program of Occidental to retain the employees. Plaintiffs are also advised that defendant Firestone agreed to count contiguous continuous service with Occidental for vesting credit only under the Retirement Plan for employees who had less than 10 years of credited service with defendant Firestone prior to the sale. Plaintiffs are further advised that defendant Firestone agreed to provide any vacation or holiday entitlement accrued by employees as of the date of the sale by reason of employment with defendant Firestone prior to the date of the sale.

V. COUNT ONE—TERMINATION PAY BENEFITS

27. The allegations of paragraphs 1 through 26 of the

Second Amended Complaint are incorporated herein by reference as though fully set forth herein.

28. Defendant Firestone's Termination Pay Plans are contained in its Salaried Personnel Manual. For purposes of this Complaint, and without limiting the applicability of earlier or later amendments or versions of said Manual, references to said Manual will be to provisions believed to be in effect on or about November 30, 1980.

29. Section 1.5.1 of said Manual sets forth defendant Firestone's uniform, corporate Statement of Policy for Terminations, and stated, in relevant part, as follows:

> To conform to State and Federal Labor Regulations and to provide equal and fair treatment to all employees, uniform termination practices have been established for all facilities. All terminating employees must have an exit interview to establish the true cause of termination. . . .

30. Section 1.5.4 of said Manual sets forth defendant Firestone's own uniform, corporate definitions which "form the basis for identifying the type of termination" and stated as follows:

> A. *Resignation*—Voluntary Termination by the employee.
>
> B. *Reduction in Force*—Termination of employment by the Company, without prejudice to the employee.
>
> C. *Separation*—Termination by the Company for continued inability to meet standards of performance.
>
> D. *Discharge*—Termination by the Company for willful misconduct. . . .
>
> E. *Retirement*—Termination in accordance with Retirement policy.
>
> F. *Death*—Termination by death.

31. Section 1.5.6 of said Manual establishes "related policies" in conjunction with "Termination by Reduction in Force" and stated, in relevant part, as follows:

Definition: *Termination of employment by Company without prejudice to the employee.*

A. Vacation—for vacation policy on employees terminated because of reduction in force, see Section 3.2.10B.

B. For Termination Pay on Reduction in Force, see Section 2.11.3. . . .

32. Section 2.11.3 of the said Salaried Personnel Manual contains defendant Firestone's Reduction-in-Force Termination Pay Plan. The third paragraph of said section stated as follows:

> Employees who are terminated because of reduction in force will be eligible for reduction in force termination pay according to the following reduction in force policy. *Employees who elect to retire in lieu of reduction in force will not be eligible for reduction-in-force termination pay.* Employees who have unsatisfactory performance supported by Employee Assessments should not be terminated under the reduction in force policy. See Section 2.11.4.

33. Section 2.11.3C of said Manual sets forth the amount and manner of payment of Reduction-in-Force Termination Pay benefits. The first paragraph of this section read, in relevant part, as follows:

> C. *Termination Pay*
>
> Each employee terminated under the Reduction-in-Force Policy will receive a lump sum payment of 2 weeks' pay per year of Company service credit. (See Section 2.11.7 for limitations on termination pay and Section 2.11.9 for Schedule. . . .)

34. Section 2.11.3 of Firestone's Salaried Personnel Manual required, as part of Firestone's Termination Pay Plans, that all participants in the Reduction-in-Force Termination Pay Plan must have an "exit interview" to inform them of the nature of the termination and "the benefits to be extended by the Company, including where applicable the benefit options available."

35. Section 2.11.10 of Firestone's Salaried Personnel Manual obligated defendant Firestone to explain, in individual exit interviews, to each participant in its Reduction-in-Force Termination Pay Plan the available employee benefit options regarding Retirement Plan benefits and Stock Purchase Plan benefits. This section read, in relevant part, as follows:

> EXIT INTERVIEW—REDUCTION-IN-FORCE
>
> Each employee who is terminated under the reduction in force policy 2.11.3 must have explained the available options regarding retirement status. (See Section 1.6.0).
>
> On a reduction in force, employees who are 55 years of age or older and have 10 or more years of service would have the following two choices in regard to benefits:
>
> *Choice 1: Early Retirement Status* (See Section 3.5.0) Pension as provided in plan (See Section 1.7.0). . . . Vested Stock Purchase & Savings Plan
>
> **Choice 2: Terminated Employee Status* (with deferred vested pension rights) (See Section 1.5.6)
>
> Two weeks' pay per year of service, reduced by the employee's proximity to retirement age. . . . Stock Purchase & Savings—partial vesting
>
> *Retirement Plan*
>
> a. Deferred vested pension to commence upon application which may be made any time prior to attainment of age 65, and actuarially reduced for commencement prior to age 65.
>
> (or)
>
> b. Employee may choose return of Retirement Plan Contribution plus interest. Company purchased portion of deferred vested pension to commence upon application which may be made any time prior to attainment

of age 65, and actuarially reduced for commencement prior to age 65....

36. Defendant Firestone's failure to provide individual exit interviews to insure that each plaintiff and each member of the class received explanations of employee benefit options prior to the sale of Firestone's Plastics Division, which extinguished said plaintiffs' employment relationship with defendant Firestone, denied said plaintiffs and the class information necessary for them to make informed decisions about their benefits under the Termination Pay Plans, the Retirement Plan, and the Stock Purchase Plan, and deprived plaintiffs and the class of employee benefit options they could have exercised if properly informed.

37. Defendant Firestone's failure to decide what employee benefit options would be available to plaintiffs and the class until after the sale of the Plastics Division, which extinguished said plaintiffs' employment relationship with defendant Firestone, and/or defendant Firestone's refusal to inform plaintiffs and the class that they would not receive any of their expected Termination Pay Plan benefits or the exit interviews referred to in paragraphs 29, and 34-35 above, deprived said plaintiffs and the class of rights and benefits in violation of defendant Firestone's Termination Pay Plans and in violation of the express policy of Section 2 of ERISA, 29 U.S.C. §1001, which requires that employee benefit plans shall be administered openly, fairly, and in accordance with the procedures set forth therein.

38. By selling the Plastics Division plants, defendant Firestone terminated plaintiffs and the class from employment. Such sale constituted a total reduction in defendant Firestone's work force at its five Plastics Division plants, and plaintiffs and the class were, therefore, qualified for Reduction-in-Force Termination Pay.

39. In the alternative, plaintiffs and the class were entitled to Basic Termination Pay as a result of their termination by defendant Firestone.

40. Section 2.11.1 of Firestone's Salaried Personnel Manual sets forth defendant Firestone's Basic Termination Pay Plan and stated as follows:

> Our *basic* termination pay policy is: For each five years' Company service credit an employee may be paid one month's termination pay at employee's current base rate. For any portion of five years' credited service, prorate the payment. Minimum payment will be two weeks' salary (10 work days). *No* termination pay is provided for employees who resign except as stated in Section 2.11.2.
>
> Termination pay is computed in terms of work days. (See Section 2.11.8 for schedule.)
>
> See the following sections to determine the termination pay to be made on the various types of terminations.

41. Defendant Firestone has failed and refused to pay any termination pay benefits to plaintiffs and the class. Such failure and refusal constituted a violation of the express terms of the Termination Pay Plans and a capricious, arbitrary, discriminatory and unreasonable construction of the Plans' provisions.

42. Defendant Firestone's refusal to pay plaintiffs and the class any termination benefits is inconsistent with defendant Firestone's payment of termination benefits to other former, salaried, non-union employees who worked in plants that were sold by defendant Firestone, *e.g.*, the payment of Basic Termination benefits, referred to in paragraph 40 above, to employees who worked in Firestone's Newport Industrial Products plant in Newport, Tennessee, which was sold to the Gleason Corporation on or about June of 1981.

43. The benefits available to employees of defendant Firestone under their Termination Pay Plans, as well as their monetary compensation and benefits under the other benefit plans maintained by defendant Firestone, constituted the consideration due from defendant Firestone to plaintiffs and the class they represent for services rendered throughout the

term of their employment under their underlying employment contract, and defendant Firestone's refusal to pay such benefits constituted a breach of said employment contract entitling plaintiffs and the class they represent to recover monetary damages. This Court has both diversity and pendent jurisdiction over this claim for breach of the employment contract.

44. Plaintiffs and the class pray that upon the trial of the case, this Court award and grant to them the termination pay benefits to which they are entitled.

[Counts II through VI, relating to claims under Firestone's retirement plan and stock purchase plan and claimed vacation benefits, omitted in printing]

XI. COUNT SEVEN—VIOLATION OF ERISA'S DISCLOSURE REQUIREMENTS

87. The allegations of paragraphs 1 through 86 of the Second Amended Complaint are incorporated herein by reference as though fully set forth herein.

88. Defendant Firestone's Termination Pay Plans are employee benefit plans within the meaning of ERISA and subject to the information and disclosure requirements of said Act. Defendant Firestone has violated the requirements of ERISA by failing and refusing to disclose certain information to plaintiffs and the class and by failing to file with the Secretary of Labor certain disclosure documents required by ERISA. By way of illustration and not limitation, plaintiffs and the class allege that defendant Firestone has violated ERISA with regard to the Termination Pay Plans in the following particulars:

(a) Defendant Firestone has failed to distribute to Plan participants a Summary Plan Description as required by Section 104(b) of ERISA, 29 U.S.C. §1024(b), and the regulations thereunder;

(b) Defendant Firestone has failed to file a copy of said

Summary Plan Description with the Secretary of Labor as required by Section 104(a) of ERISA, 29 U.S.C. §1024(a), and the regulations thereunder;

(c) Defendant Firestone has failed to provide to Plan participants an Updated Summary Plan Description as required by Section 104(b) of ERISA, 29 U.S.C. §1024(b), and the regulations thereunder;

(d) Defendant Firestone has failed to file a copy of said Updated Summary Plan Description with the Secretary of Labor as required by Section 104(a) of ERISA, 29 U.S.C. §1024(a), and the regulations thereunder;

(e) Defendant Firestone has failed to distribute to Plan participants a Summary of Material Modifications to the Plan as required by Section 104(b) of ERISA, 29 U.S.C. §1024(b), and the regulations thereunder, notwithstanding numerous modifications and revisions of the said Plan;

(f) Defendant Firestone has failed to file a copy of the Summary of Material Modifications with the Secretary of Labor as required by Section 104(a) of ERISA, 29 U.S.C. §1024(a), and the regulations thereunder;

(g) Defendant Firestone has failed to provide Plan participants with a Statement of Participant's Rights as required by Section 104(c) of ERISA, 29 U.S.C. §1024(c), and the regulations thereunder;

(h) Defendant Firestone has failed to establish and maintain a procedure for the making of claims and the appeal and review of the denial of claims under the Termination Pay Plans as required by 29 CFR §2560.503-1.

89. Defendant Firestone has violated Section 104(b) of ERISA, 29 U.S.C. §1024(b), and 29 CFR §2520.104b-1 by refusing to permit plaintiffs and the class to read or examine the Salaried Personnel Manual which contains the Termination Pay Plans, claiming that said Manual was confidential and not available for inspection.

90. The refusal by defendant Firestone to provide and disclose information concerning the Termination Pay Plans to its participants violates the fundamental policy of ERISA as set forth in Section 2(a) and (b) thereof, 29 U.S.C. §1001(a) and (b), that information concerning the terms and provisions of all employee benefit plans be made readily available to Plan participants and their beneficiaries.

91. Section 104(b)(4) and 105 of ERISA, 29 U.S.C. §§1024(b)(4) and 1025, require a Plan Administrator to comply with written requests of participants for certain information.

92. The Administrator of the defendant Retirement Plan has failed to comply with requests of plaintiffs and the class to furnish information referred to in paragraph 91 above.

93. The Administrator of the defendant Stock Purchase Plan has failed to comply with requests of plaintiffs and the class to furnish information to in paragraph 91 above.

94. As a result of the above acts and omissions by defendants, plaintiffs are entitled to recover the monetary relief provided by Section 502(c) of ERISA, 29 U.S.C. §1132(c), and to such other relief as the Court may deem proper.

95. Plaintiffs and the class pray that upon the trial of the case, this Court award and grant to them the relief to which they are entitled under ERISA as a result of defendants' failure and refusal to provide information to which they are entitled about the Termination Pay Plans, the Retirement Plan, and the Stock Purchase Plan.

XII. PRAYER FOR RELIEF

96. The allegations of paragraphs 1 through 95 of the Second Amended Complaint are incorporated herein by reference as though fully set forth herein.

WHEREFORE AND FOR ALL OF WHICH, plaintiffs and the class request the following relief:

(a) that plaintiffs and the class be awarded all termination pay benefits to which they are entitled under the Termination Pay Plans and that they be granted all termination pay benefits which are now due and owing;

* * *

(d) that plaintiffs and the class be awarded the monetary relief provided by Section 502(c) of ERISA, 29 U.S.C. §1132(c), and such other relief as the Court deems proper under said Section of the Act;

(e) that plaintiffs and the class be awarded reasonable attorneys fees and costs of this action pursuant to Section 502(g) of ERISA, 29 U.S.C. §1132(g); and

(f) that plaintiffs and the class be granted such other declaratory, injunctive, and monetary relief as the Court may deem appropriate.

* * *

DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT

[caption omitted in printing]

INTRODUCTORY PARAGRAPH

Defendants admit that the named plaintiffs are former salaried employees of defendant Firestone Tire & Rubber Company ("Firestone") who were not union members as of November 30, 1980, and that the named plaintiffs purport to bring this action on behalf of a class pursuant to section 502 of the Employment Retirement Income Security Act of 1974 ("ERISA"). Defendants deny that any employee benefits to which the named plaintiffs are entitled have been denied them, whether under The Firestone Tire & Rubber Company Retirement Plan for Salaried Employees ("Retirement Plan"), The Firestone Tire & Rubber Company Stock Purchase & Savings Plan ("Stock Purchase Plan"), Firestone's basic termination pay policy and reduction in force termination pay policy ("termination pay policies"), or otherwise. Defendants further deny that the named plaintiffs are entitled to any monetary or equitable relief under ERISA, including attorneys' fees or costs.

I. JURISDICTION AND VENUE

1. Defendants admit that plaintiffs purport to bring this action under the statutory provisions cited in paragraph 1; deny that any claim for relief has been stated under ERISA, federal common law, or state law; and deny that this Court has either pendent jurisdiction or jurisdiction based on diversity of citizenship over plaintiffs' claims.

2. Admitted.

II. PARTIES

3. Defendants admit that Richard Bruch is an individual and are without knowledge or information sufficient to form a

belief as to the truth of the averment regarding his current address.

4. Defendants admit that John R. Chubb is an individual and are without knowledge or information sufficient to form a belief as to the truth of the averment regarding his current address.

5. Defendants admit that Albert Schade is an individual and are without knowledge or information sufficient to form a belief as to the truth of the averment regarding his current address.

6. Defendants admit that Richard Schollenberger is an individual and are without knowledge or information sufficient to form a belief as to the truth of the averment regarding his current address.

7. Defendants admit that Ronald R. Smith is an individual and are without knowledge or information sufficient to form a belief as to the truth of the averment regarding his current address.

8. Defendants admit that Leonard A. Smolinski is an individual and are without knowledge or information sufficient to form a belief as to the truth of the averment regarding his current address.

9. Defendants admit that the named plaintiffs are former salaried employees of Firestone who were not union members as of November 30, 1980, at which time Firestone sold its Plastics Division (including its Pottstown, Pennsylvania, plastics plant) to the Hooker Chemical Division of the Occidental Petroleum Corporation ("Occidental"). Defendants deny that this is an appropriate case for class treatment. Defendants admit that Richard Bruch, John R. Chubb, Albert Schade, Richard Schollenberger, and Ronald R. Smith are presently or were prior to termination of employment with Firestone participants in the Retirement Plan and the Stock Purchase Plan. Defendants admit that Leonard A. Smolinski is presently or was prior to his termination of employment

with defendant Firestone a participant in the Retirement Plan, and deny that Leonard A. Smolinski has ever been a participant in the Stock Purchase Plan. Defendants admit that Firestone's termination pay policies apply generally to its employees, including the named plaintiffs, but deny that the terms of Firestone's termination pay policies ever entitled any of the named plaintiffs to termination pay.

10. Admitted.

11. Admitted.

12. Admitted.

13. Defendants deny that "Firestone Tire & Rubber Company Termination Pay Plans" are defendants in this action; deny that Firestone has more than one termination pay plan under ERISA; admit that Firestone's basic termination pay policy and reduction in force termination pay policy are designed to provide severance benefits to certain Firestone employees; and admit the remaining allegations of paragraph 13.

III. THE CLASS ACTION ALLEGATIONS

14. Defendants deny that this case is an appropriate class action and deny that the named plaintiffs are appropriate representatives of any class of former salaried non-union employees of Firestone's Plastics Division. Defendants admit that Firestone formerly owned plants in Pottstown, Pennsylvania; West Caldwell, New Jersey; Perryville, Maryland; Salisbury, Maryland; and Baton Rouge, Louisiana; and that these plants were sold to the Hooker Chemical Division of Occidental on or about November 30, 1980.

15. Admitted.

16. Defendants admit that the class alleged by plaintiffs exceeds 500 persons and deny that the alleged class is appropriate in this action.

17. Denied.

18. Denied.

19. Defendants admit that plaintiffs have retained counsel; are without knowledge or information sufficient to form a belief as to the truth of plaintiffs' allegation regarding the experience of plaintiffs' counsel; and deny that these plaintiffs are adequate representatives of the alleged class.

20. Denied.

21. Denied.

22. Defendants admit that Firestone's salaried personnel policies establish termination benefits and termination procedures applicable to salaried employees generally and that those policies are administered by Firestone in its Akron, Ohio offices. Defendants further admit that all members of the purported class ceased to be Firestone employees upon the sale of Firestone's Plastic Division to Occidental. Defendants deny that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV. FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

23. Admitted.

24. Admitted.

25. Admitted.

26. Defendants admit that all Plastics Division employees continued to be employed by Occidental after sale of the Plastics Division plants, excepting such employees as may have elected to retire or to seek other employment; admit that Firestone agreed as a term of the sale of its Plastics Division to use its best efforts to cooperate, at Occidental's request, in any reasonable program by Occidental to retain the former Firestone employees; admit that Firestone agreed to count contiguous service with Occidental for vesting credit under the Retirement Plan for employees with less than ten years of credited service with Firestone prior to the sale; admit that

Firestone agreed to bear the expense of vacation or holiday entitlement accrued by former Firestone employees as of November 30, 1980; but deny that Firestone agreed to provide any additional payment directly to its employees for such vacation or holiday entitlement.

V. COUNT ONE—TERMINATION PAY BENEFITS

27. Defendants restate their answers to paragraphs 1-26 of the Second Amended Complaint and incorporate those answers by reference.

28. Defendants admit that Firestone's termination pay policies are contained in its Handbook for Salaried Employees and its Salaried Personnel Manual, but deny that those policies are exclusively set forth in the Salaried Personnel Manual.

29. Defendants admit that section 1.5.1 of the Salaried Personnel Manual, in effect as of November 30, 1980, contains the material quoted in paragraph 29; deny plaintiffs' characterization of that section; and deny that the quote completely sets forth the provisions of that section.

30. Defendants admit that section 1.5.4 of the Salaried Personnel Manual, in effect as of November 30, 1980, contains the material quoted in paragraph 30; deny plaintiffs' characterization of that section; deny that the quote completely sets forth the provisions of that section; and deny that the definitions completely determine the applicability of the policies set forth in the Salaried Personnel Manual.

31. Defendants admit that section 1.5.6 of the Salaried Personnel Manual, in effect as of November 30, 1980, contains the material quoted in paragraph 31; deny plaintiffs' characterization of that section; and deny that the quote completely sets forth the provisions of that section.

32. Defendants admit that section 2.11.3 of the Salaried Personnel Manual contains Firestone's policy on reduction-in-force termination pay; admit that the third paragraph of that

section, in effect as of November 30, 1980, is accurately set forth in paragraph 32; and deny that section 2.11.3 constitutes the entirety of a "plan" under ERISA.

33. Defendants admit that section 2.11.3 of the Salaried Personnel Manual, in effect as of November 30, 1980, contains the material quoted in paragraph 33; deny plaintiffs' characterization of that section; and deny that the quote is complete.

34. Defendants deny that plaintiffs' paraphrasing of section 2.11.3 is complete or accurate; and admit that section 2.11.3 of the Salaried Personnel Manual, in effect as of November 30, 1980, provides in part:

> B. Exit Interview
>
> All employees who are to be terminated due to reduction in force must have an exit interview to inform them of the nature of the termination, State Unemployment Compensation Benefits and the benefits to be extended by the Company, including where applicable the benefit options available. (See Sections 1.5.2 and 2.11.10 concerning exit medical examinations.)

35. Defendants admit that section 2.11.10 of the Salaried Personnel Manual, in effect as of November 30, 1980, contains the material quoted in paragraph 35; deny that the quoted material is complete; and deny that this policy is part of any plan under ERISA.

36. Denied.

37. Denied.

38. Defendants admit that plaintiffs' employment with Firestone terminated upon the sale of the Plastics Division on November 30, 1980; deny that such sale constituted a reduction in force; and deny that plaintiffs were qualified for termination pay of any kind.

39. Denied.

40. Defendants admit that section 2.11.1 of the Salaried Personnel Manual contains the quoted material; deny plaintiffs' characterization of the material; and deny that this material is the entirety of any termination pay plan.

41. Defendants admit that Firestone has not paid any termination pay benefits to employees of its Plastics Division who, upon the sale of the Plastics Division to Occidental, immediately became employed by Occidental; deny that any such employee was entitled to termination pay; deny that any term of Firestone's termination pay policies was violated; and deny that Firestone acted in any way capriciously, arbitrarily, discriminatorily, or unreasonably.

42. Denied.

43. Denied.

44. Defendants deny that plaintiffs are entitled to any of the requested relief.

[Counts II through VI, relating to claims under Firestone's retirement plan and stock purchase plan and claimed vacation benefits, omitted in printing]

XI. COUNT SEVEN—VIOLATION OF ERISA'S DISCLOSURE REQUIREMENTS

87. Defendants restate their answers to paragraphs 1-86 of the Second Amended Complaint and incorporate those answers by reference.

88. Defendants admit that Firestone's termination pay policies constitute an employee benefit plan within the meaning of ERISA; admit that all employee benefit plans are subject to ERISA's reporting and disclosure provisions; deny that Firestone has violated ERISA in any way entitling plaintiffs to relief; and allege that Firestone has administered each of its employee benefit plans in good faith.

89. Denied.

90. Denied.

91. Admitted.

92. Denied.

93. Denied.

94. Denied.

95. Defendants deny that plaintiffs are entitled to any of the requested relief.

XII. PRAYER FOR RELIEF

96. Defendants restate their answers to paragraphs 1-95 of the Second Amended Complaint and incorporate those answers by reference. Defendants further deny that plaintiffs are entitled to any of the relief requested in their Second Amended Complaint, and pray that the Court dismiss this action with prejudice and award defendants their costs and such other relief as may be just and equitable.

DEFENDANTS' AFFIRMATIVE DEFENSES

First Affirmative Defense. Plaintiffs' Second Amended Complaint fails to state any claim upon which relief may be granted.

Second Affirmative Defense. Plaintiffs' Second Amended Complaint fails to articulate the basis for the alleged pendent state law claims and fails to specify the state or states involved. To the extent the Second Amended Complaint purports to set forth a state law claim, said claim should be dismissed for lack of subject matter jurisdiction and for failure to state a cause of action upon which relief may be granted under state law.

* * *

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[caption omitted in printing]

Defendants, The Firestone Tire & Rubber Company, Firestone Tire & Rubber Company Retirement Plan for Salaried Employees, and Firestone Tire & Rubber Company Stock Purchase and Savings Plan, move pursuant to rule 56 of the Federal Rules of Civil Procedure for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law. This Motion is based upon the pleadings and depositions in this action and upon the accompanying Affidavits of Thomas E. Robinson and Richard K. Johnson and the accompanying Memorandum of Law and upon the Exhibits to each of these documents. Oral argument is requested.

* * *

AFFIDAVIT OF THOMAS E. ROBINSON

[caption omitted in printing]

THOMAS E. ROBINSON states as follows:

1. I am the Director of Compensation and Management Development for The Firestone Tire & Rubber Company ("Firestone"), a position I have held since February 1984. From June 1981 to February 1984 I was Vice President of Employee Relations for Firestone's Corporate Development Group. Between October 1973 and June 1981 I was employed in various personnel capacities, including Director of Corporate Personnel for Firestone (1980-81), Director of Corporate Personnel Planning for Firestone (1980), Personnel Manager for The Firestone International Company (1977-80), Personnel Manager for The Firestone Steel Products Company (1976-77), and Personnel Manager for Firestone's two plants in Akron, Ohio and for Firestone's corporate manufacturing management (1973-76).

2. Firestone is principally in the business of manufacturing and selling tires, although it had before 1980 diversified into other areas, including plastics. Firestone's Plastics Division consisted in 1980 of five plants in Pottstown, Pennsylvania; West Caldwell, New Jersey; Perryville, Maryland; Salisbury, Maryland; and Baton Rouge, Louisiana. At these plants, resins, copolymers, monomers, and similar plastic materials were manufactured. For business reasons related to the economic recession of the late 1970's, in 1980 Firestone began to seek a buyer for the Plastics Division. On September 16, 1980, Firestone agreed to sell the Plastics Division to the Hooker Chemical Division of Occidental Petroleum Corporation ("Occidental") as an ongoing concern ("the Sale"); a copy of the agreement of sale is attached as Exhibit A to this Affidavit. Consistent with that agreement, all of the Plastics Division employees became employees of Occidental on November 30, 1980, without any break in employment or changes in work responsibilities.

3. Over the course of the past twelve years, I have consistently been responsible for helping to formulate, for administering, and for interpreting Firestone's salaried employee policies set forth in its Salaried Personnel Manual (the "Manual") and summarized in its Handbook for Salaried Employees (the "Handbook"), including policies relating to termination pay. I am familiar both with the terms of those policies and with their application in various situations. One of the situations with which I am fully familiar is the application of Firestone's termination pay policies to the sale of a plant or division as an ongoing business where the former Firestone employees are employed by the successor company.

4. Firestone has had termination pay policies for two kinds of termination pay: "basic" termination pay and "reduction in force" termination pay. The terms of Firestone's termination pay policies are set forth in section 2.11.0 of the Manual. Manual sections concerning termination pay that were in effect on November 30, 1980, the date of the Sale, are attached as Exhibit B to this Affidavit.

5. Although there have been amendments to section 2.11.0 of the Manual over the past several years, the provisions relating to eligibility for basic termination pay remained essentially unchanged from at least 1973 (when I first began to work as a personnel representative for Firestone) to the date of the Sale. In short, under Manual §§ 2.11.4-.5 basic termination pay is available only for employees who are "separated" (described under § 1.5.4 as terminated by Firestone for "continued inability to meet standards of performance") or "discharged" (described under § 1.5.4 as terminated by Firestone for "willful misconduct, violation of Company policy, dishonesty, misuse of Company property, or any other kind of irregularity"). Basic termination pay is not, and to my knowledge never has been, available to employees working in a plant sold as an ongoing business. For the period 1973 through the date of the Sale, basic termination pay was calculated based on one month's pay for each five years the employee had worked for Firestone, under section 2.11.1 of the

Manual. Additionally, under Manual § 2.11.2 a very limited amount of termination pay (up to two weeks' pay) is available to an employee who "resigns" (described under § 1.5.4 as "voluntary termination by the employee") effective with reasonable notice when Firestone makes the employee's termination effective immediately.

6. Firestone has also provided reduction in force termination pay, payable only when an employee is terminated due to a reduction in force ("RIF"). Under Manual § 1.5.4 a RIF is described as termination by Firestone "without prejudice to the employee," but RIF termination pay is not, and to my knowledge never has been, available to employees working in a plant sold as an ongoing business. For the period 1973 through the date of the Sale, RIF termination pay was calculated based on two weeks' pay for each year an employee had worked for Firestone, under section 2.11.9 of the Manual.

7. Firestone has not been reluctant to grant termination pay when the circumstances of a sale or disposition of a plant or a division have fallen within the provisions of Firestone's termination pay policies. Approximately 2,900 salaried employees ceased working for Firestone between 1976 and 1982 because of domestic plant dispositions. Of these 2,900 employees, about 1,650 received termination pay. All of these employees either were terminated at the time of a plant closure or were reduced in force just prior to a sale of a plant as an ongoing business where Firestone was unable to arrange for continued employment with the purchaser. Of the 1,250 or so employees who did not receive termination pay, approximately 430 retired upon disposition of a plant and 820 were employed at a plant sold as an ongoing concern where Firestone negotiated for and obtained a commitment of continued employment from the successor company. Plaintiffs in this action fall into the latter group of employees.

8. Firestone's basic termination pay policies and its RIF termination pay policies both have as their goal alleviating a period of unemployment for terminated employees. This goal

is apparent throughout those policies. For example, the Manual provides in section 2.11.3 that RIF termination pay was established "with the goal of minimizing the economic and mental stress of terminated employees during the period of time between release by Firestone and securing other employment (or reemployment by Firestone)." The Manual goes on to provide that employees with unsatisfactory records should be separated rather than reduced in force, that reductions should begin with the least experienced employees, that all employees reduced in force are to be given an individual exit interview, that medical and life insurance is to continue for 3 to 12 months or until the employee finds a job providing insurance, that employees who are rehired will receive continuous service credit, that employees reduced in force are entitled to preferential rehiring, and that employees whose jobs are eliminated but who refuse other positions with Firestone in the same geographic location at the same or higher salary and grade levels are ineligible for termination pay. None of these provisions applies to the sale of a plant when all employees continue to work for the purchaser, and no provision of the Manual states that termination pay is available upon the sale of a plant as an ongoing concern. As indicated in paragraph 7 above, Firestone's termination pay policies have consistently been applied to distinguish between the closing of a plant (where employees presumably suffer a period of unemployment) and the sale of a plant as an ongoing concern (where employees are assured jobs with the purchaser). In short, those policies provide termination pay for employees working in a plant that is closed but do not provide termination pay for employees in a plant that is sold as an ongoing concern and with regard to whom Firestone has obtained a formal or informal commitment of continued employment by the successor company.

9. Based on these principles, Firestone has in the past consistently paid termination pay to employees of plants it has closed without securing continued employment, but in no sale situation were Firestone employees for whom Firestone

arranged continued employment by the successor company given termination pay. For example, Firestone's plant in Romeo, Michigan was sold as an ongoing concern under circumstances where Firestone was able to secure continued employment for only about half of the salaried employees. Firestone paid termination pay to the employees who lost their jobs on account of the sale, but paid no termination pay to the employees hired by the purchaser.

10. Firestone's Manual has always been deemed confidential by Firestone, in that the Manual itself is generally distributed only to personnel managers and senior management executives. Firestone's consistent policy, however, has been to make the Manual available upon request in a facility's personnel office to any employee who wishes to see a specific policy, with a personnel representative available to assist in interpreting the policy or to answer any questions. This means of access to the Manual was designed to avoid misunderstandings that might arise if employees unfamiliar with the technical nature and interrelated structure of the Manual tried to interpret isolated policy sections.

11. The provisions of Firestone's termination pay policies were summarized in Firestone's Handbook, which was made available from time to time to Firestone salaried employees. A copy of the portion of Firestone's Handbook in effect in 1980 and pertinent to termination pay is attached as Exhibit C to this Affidavit. This statement was intended to summarize the more detailed policy statements in the Manual.

12. There has been only one instance in which employees at a Firestone plant that was sold as an ongoing business under circumstances where Firestone secured their continued employment received monetary benefits from Firestone as a consequence of the sale. That instance involved special circumstances relating to the sale of an industrial products plant in Newport, Tennessee. The purchaser of the Newport plant offered benefits that were substantially less than Firestone's benefits; for example, the successor company

had no pension plan at all and provided a much lower level of health insurance and other benefits, imposing a significant hardship on the employees. Nevertheless, those employees, like all other Firestone employees affected by such sales, did not qualify for termination pay under Firestone's termination pay policies. In order to provide partial relief from this special hardship, Firestone adopted a one-time policy applicable only to its Newport plant, which granted the Newport employees a Service Recognition Award equal to one month's pay for each five years an employee had been employed by Firestone.

* * *

SECOND AFFIDAVIT OF THOMAS E. ROBINSON

[caption omitted in printing]

THOMAS E. ROBINSON states as follows:

1. This Affidavit supplements my previous Affidavit of October 24, 1985 in connection with this action.

2. Firestone sold plants as ongoing businesses on three occasions before the sale of the Plastics Division and during my tenure with the company. The first two occasions were sales of adhesives plants in Detroit, Michigan and Trenton, New Jersey in July 1974. In each of these sales the plant's purchaser agreed to hire the existing employees and on that basis Firestone paid the employees no termination pay. The third occasion was the sale of Firestone's World Bestos plant in New Castle, Indiana in March 1975, where the purchaser similarly hired all the employees and the employees were therefore paid no termination pay. Although Firestone's Salaried Personnel Manual ("Manual") was amended in November 1980 to clarify its termination policies, the amendments did not change the application of those policies to employees who were affected by the sale of a plant as an ongoing concern.

3. In March 1980 Firestone closed its tire plant in Pottstown, Pennsylvania. Firestone was not able to arrange for employment of the tire plant employees, so almost all of those employees lost their jobs and were given reduction in force ("RIF") termination pay. It was not material to whether a particular employee received termination pay that he was able to find reemployment for himself, because Firestone uniformly pays termination pay to all RIF'd employees regardless of their success in obtaining reemployment with other companies.

4. Firestone has never chosen to distinguish between those employees who succeed in obtaining jobs immediately and those who remain unemployed for purposes of their eligibility for termination pay. Firestone believes that many or

most terminated employees suffer a period of unemployment unless Firestone secures continued employment for them. Those exceptional cases where terminated Firestone employees are successful in obtaining immediate reemployment by other companies would present an administrative dilemma for Firestone if Firestone conditioned termination pay on failure to become reemployed. It would be unfair to deny termination pay to those employees whose reemployment came to Firestone's attention by chance unless Firestone undertook to monitor the employment status of all termination pay recipients to ensure that termination pay went only to those who remained unemployed. However, Firestone is unwilling to establish an effective program of continually monitoring the employment status of termination pay recipients for a number of reasons, including the administration burden that such a program would entail and the ill will that such a program would generate among Firestone's past and current employees. Moreover, Firestone believes that it would be virtually impossible to monitor the employment status of termination pay recipients in a uniform manner.

5. Section 1.5.4 of Firestone's Manual, although it contains a general description of various types of terminations, does not encompass all possible circumstances under which an employee may be terminated from Firestone. Indeed, section 1.5.4 explicitly refers to other provisions of the Manual, including section 1.5.11, which itself refers to Forms Section 1.5.10 "[f]or a complete list of [termination] codes." Forms Section 1.5.10, attached as Exhibit A to this Affidavit, includes termination codes for leaves of absence and extended time off, both of which are types of terminations not listed in section 1.5.4 of the Manual. In addition, as Forms Section 1.5.10 makes clear, a "separation" includes a termination for "transfer" or on account of the unavailability of a "suitable job," categories not found in section 1.5.4 of the Manual.

6. The determination whether Firestone's termination of employees as the result of the sale of a plant is or is not a RIF is not made at the plant level because the determination

relates to the collective rights of all plant employees, including the plant manager and the personnel manager, and because such determinations must be made uniformly throughout the company consistent with the terms of all company-wide policies.

7. A number of persons employed at Firestone's Plastics Division were issued copies of Firestone's Manual. Those persons included Todd Walker, the president of the Plastics Division; James F. Reder, personnel manager; Elbert L. Abel, salaried personnel section manager; James J. McCoskey, controller; and Eleanor L. Kephart, personnel accounting assistant. I am advised that each of these individuals is a member of the plaintiff class.

8. I am aware that the comparative levels of salaried employee benefits at Occidental and Firestone were discussed at the time of the sale of the Plastics Division to Occidental. I have also discussed the comparative levels of such benefits, in the ordinary course of my duties at Firestone, with persons knowledgeable about both companies' programs. Based on this information, it is my belief that Occidental's employee benefit program, as applied, is as generous as Firestone's employee benefit program or more so. It is also my belief, based on what I was told about the sale of the Plastics Division at the time, that Firestone understood Occidental benefits to be substantially similar to Firestone's.

9. Although Firestone has now distributed a summary plan description for its termination pay policies, it had not done so before November 30, 1980, except to the extent that Firestone's Handbook for Salaried Employees summarized those policies for its employees. Until judicial decisions in the early 1980's made clear that termination pay was covered by ERISA, I was (and to the best of my knowledge my colleagues at Firestone were) unaware that a summary plan description was required for a termination pay policy.

10. The average length of service among employees of Firestone's Plastics Division as of November 1980 was 13½

years. Plaintiffs' termination pay claims, therefore, average an amount equal to 27 weeks, or just over six months, of salary. On information and belief, Occidental terminated no Plastics Division employee until April 1982. Thus, Firestone's transaction with Occidental secured a minimum overall of eight months more salary for the Plastics Division employees than if those employees had been terminated by Firestone and paid termination pay upon a closing of their plants.

* * *

No. 87-1054

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,

v.

RICHARD BRUCH, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED*

1. In light of ERISA's intent (a) that plan fiduciaries have discretion to make benefits decisions and (b) that fiduciaries' actions be governed by trust law, must not a court reviewing a fiduciary's denial of benefits apply the arbitrary and capricious standard?

2. In order to come within ERISA's definition of a "participant" in an employee benefit plan, must not an employee or former employee either have already satisfied the eligibility criteria established by the plan or be able to satisfy those criteria in the future?

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*The information set forth in the Petition concerning the parties to the proceeding remains accurate with the exception that Firestone now has a parent company, Bridgestone Corporation, a Japanese corporation.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (A45-A72)[1] is reported at 640 F. Supp. 519. The opinion of the United States Court of Appeals for the Third Circuit (A1-A44), which reversed the decision of the district court on the questions presented by the Petition for Certiorari, is reported at 828 F.2d 134. The order of the court of appeals denying rehearing and rehearing in banc (A75-A76) is unreported.

1. References to "A" pages are to the Appendix to the Petition for Certiorari. References to "JA" pages are to the Joint Appendix being filed concurrently with this Brief, which is paginated consecutively to the Appendix to the Petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on August 31, 1987. The order denying rehearing and rehearing in banc was entered on September 25, 1987. The Petition for Certiorari was filed on December 23, 1987 and was granted on April 4, 1988.

STATUTORY PROVISIONS INVOLVED

Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104(a)(1), and section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), contain fiduciary responsibility provisions relevant to the standard of review question. The term "participant" is defined in section 3(7) of ERISA, 29 U.S.C. § 1002(7). Section 104(b) of ERISA, *id.* § 1024(b), sets forth a benefit plan administrator's obligations to disclose certain types of plan documents to participants upon written request, and section 502(c) of ERISA, *id.* § 1132(c), permits an award of damages for failure to comply with these obligations. These statutory provisions and other relevant portions of ERISA are set forth in the Appendix to the Petition. (A77-A85)

STATEMENT OF THE CASE

Plaintiffs represent the class of non-union salaried employees who were working in the Plastics Division of Firestone and continued in their jobs after the Division was sold as a going concern in 1980 to the Hooker Chemical Division of Occidental Chemical Corporation. (A4) Plaintiffs brought this action under ERISA to recover termination pay (*see* JA98-JA104) and other benefits allegedly due them as a result of the sale.[2] Certain individual plaintiffs also claimed discretionary

2. Plaintiffs also claimed various retirement, stock, and vacation benefits, which are described in the court of appeals' opinion. (*See* A4-A6) All of these claims have been withdrawn, settled, or resolved in favor of Firestone. (A3, A5-A6 n.2)

damages under section 502(c) of ERISA, 29 U.S.C. § 1132(c), for alleged deficiencies in Firestone's responses to requests for documents concerning its plans made by plaintiffs after the sale. (*See* JA104-JA106)[3]

District Court Proceedings

At the conclusion of discovery, the parties filed cross motions for summary judgment. Firestone's motion (*see* JA116) was supported, *inter alia*, by two affidavits of an executive in its corporate personnel office. The affidavits set forth the terms of Firestone's termination pay plan, explained why the plan did not apply to a sale of a plant as an ongoing concern, and reviewed Firestone's past practice under the plan. (*See* JA117-JA126). After full briefing and oral argument, on June 9, 1986 the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) ruled in Firestone's favor on all of plaintiffs' then pending claims. (A73)

The district court held that Firestone's decision that plaintiffs were not entitled to reduction in force ("RIF") termination pay on the facts presented was entitled to deference, but that "because Firestone avoided the outlay of a substantial amount of money by denying the plaintiffs termination pay, . . . [the court] may scrutinize the decision more closely." (A53) The court nevertheless concluded that the decision was neither arbitrary nor capricious because nothing in Firestone's policies or in the generally accepted meaning of the term "reduction in force" suggests that employees who remain in their jobs and continue to draw the same wages after the sale of a plant have suffered a RIF. (A53-A54)

3. Plaintiff Bruch claimed that he never received a response to his request for a copy of Firestone's stock purchase plan. (A71) In their motion for summary judgment, plaintiffs Smolinski and Schade also claimed for the first time that Firestone failed to comply with their requests for information and documents concerning its termination pay policies. (A69, A71) Smolinski had previously complained of inadequacies in Firestone's four letters responding to his request for information about retirement benefits. (A71) Plaintiffs later conceded that Smolinski received an adequate response to that request. (*See* Memorandum in Opposition to Defendants' Motion for Summary Judgment at 36)

The district court also denied plaintiffs' section 502(c) damage claims because the individual requesters were not "participants" in Firestone's benefit plans entitled to plan documents at the time they made their requests. (A71-A72) The court held that plaintiffs were not then eligible for benefits under the plans as to which they sought documents and that they would not become eligible for benefits in the future because they were no longer employed by Firestone. (A71, A72) The court also noted that plaintiffs had not been prejudiced by Firestone's responses to their requests. (A72)

Decision of the Court of Appeals

On August 31, 1987, the United States Court of Appeals for the Third Circuit (Higginbotham and Becker, C.JJ., and Dumbauld, D.J.) reversed both of these holdings in an opinion written by Judge Becker. (A44) The court recognized "the clear weight of authority" supporting use of the arbitrary and capricious standard in reviewing benefits denials under ERISA (A8), but nonetheless held that Firestone's denial of termination pay should be reviewed de novo (A3). After noting that the deferential arbitrary and capricious standard was derived from the common law of trusts, which is the basis for the fiduciary standards of ERISA (A14), the court concluded that under trust law courts "will not defer to a trustee's judgment when a conflict of interest threatens the trustee's impartiality" (A15). In the court's view, such a potential conflict of interest was present here because Firestone's termination pay plan "[w]as controlled entirely by the employer" and "every dollar provided in benefits was a dollar spent by defendant Firestone." (A21)

Based on this potential conflict, the court distinguished decisions involving benefit funds governed by section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). The court noted that while section 302(c)(5) establishes fiduciary standards similar to those contained in ERISA (A14), it also assures the impartiality of the plan trustees by requiring that employers and employees be equally represented in the administration of a fund (A15, A21).

Having rejected the trust-based arbitrary and capricious standard of review, the court of appeals held that Firestone's adoption of a termination pay plan was an offer of a "unilateral contract" that its employees accepted by continuing employment with the company. (A30) The court therefore concluded that the district court should not defer to Firestone's decision to deny benefits but should rather determine for itself the validity of that decision "tak[ing] as [its] starting point the principles governing construction of contracts between parties bargaining at arms' length." (A25)[4]

On the damage claims under section 502(c) of ERISA, the court of appeals held that all former employees who claim a right to benefits under a plan are "participants" in the plan within the meaning of section 3(7) of ERISA, 29 U.S.C. § 1002(7). (A41-A42) The court thus concluded that the individual plaintiffs were entitled to documents concerning Firestone's benefit plans in response to their requests regardless of whether they had colorable claims—or any entitlement at all—to benefits under the plans. (A43) The court explicitly rejected the contrary positions of two other courts of appeals on this point (A40-A41) and remanded the section 502(c) claims along with the termination pay claim for further proceedings in the district court.

SUMMARY OF ARGUMENT

1. The circuits have uniformly recognized that as a general rule a court must defer to an ERISA plan fiduciary's benefits decision unless it is arbitrary and capricious. Both the language and the legislative history of ERISA compel this rule. The statute grants fiduciaries the discretion to make benefits decisions, and courts must therefore review the exercise of that discretion deferentially. The statute also provides that fiduciaries' conduct is to be governed by principles of

4. The specific principles mentioned by the court were "common usage in the trade," past practice under the plan, and the district court's supplying of a "reasonable" term in the absence of agreement between the parties as to a portion of the contract. (A29-A31)

trust law that had previously been incorporated in other federal employee benefits legislation—principles that have long included judicial review under an "abuse of discretion" or "arbitrary and capricious" standard. Indeed, fiduciaries' discretion to act within the confines of the detailed fiduciary standards set forth in ERISA is an essential component of the balance struck by Congress between imposing minimum regulatory standards on employee benefit plans and limiting the costs of that regulation so as to promote the continuation and expansion of such plans.

Notwithstanding this unanimous case law and clear statutory intent, the Third Circuit has now held that deferential judicial review is inappropriate "when a conflict of interest threatens the [plan fiduciary's] impartiality." (A15) Although plaintiffs had produced no evidence that Firestone's denial of termination pay was in fact motivated by self-interest, the court found de novo review to be appropriate in this case because Firestone had a *potential* conflict of interest. This "conflict" arose from the mere fact that plan benefits were paid out of Firestone's corporate assets and Firestone was the sole fiduciary of the plan.

ERISA provides no basis for altering the standard of review in this potential conflict situation. The statute's fiduciary responsibility provisions do not vary depending on who is the fiduciary or whether the plan is funded. Indeed, the statute expressly permits a representative of an employer or other party in interest to serve as a fiduciary and thus to exercise discretion in making benefits decisions despite any potential conflict. Thus, Congress obviously did not consider the existence of a potential conflict like the one presented by this case to be anything more than a factor to be weighed in evaluating the reasonableness of the fiduciary's actions. This is also the rule under the common law of trusts, especially when the party who granted discretion to the fiduciary—in trust law, the settlor; here, Congress—knew of the conflict of interest when it made the grant.

Where the fiduciary in fact *acts* out of an improper motive (*e.g.*, to further his own interest), he obviously has breached the stringent fiduciary standards of ERISA. The arbitrary and capricious standard of judicial review is sufficiently flexible and searching to determine whether the fiduciary's benefits decision was the product of such a motive and otherwise to evaluate the propriety of the decision. There is not a scintilla of evidence of any improper motive or other impropriety in this case. Firestone's denial of termination pay to these plaintiffs should therefore have been affirmed.

2. The Third Circuit also deviated from prior authority by interpreting the term "participant" to include former Firestone employees merely because they claimed to be entitled to benefits. This holding is plainly contrary to ERISA's definition of a "participant," which includes "any employee or former employee ... who is or may become eligible to receive a benefit ... from an employee benefit plan." This language requires consideration of an employee or former employee's current fulfillment of the eligibility criteria established by the relevant plan and his ability to fulfill those criteria in the future. A person claiming a right to benefits under the plan is not a participant merely because of the possibility that a court may decide that he is entitled to the benefits he claims.

The legislative history of both ERISA and its predecessor confirms that Congress did not intend such an expansive reading of "participant" as that adopted by the Third Circuit. Nor would Congress have countenanced the enormous burden this interpretation would impose on plan administrators, who are affirmatively required to disclose various types of information to all participants on a regular basis as well as to respond to particular requests for information or documents like those made in this case. Finally, although the Third Circuit believed that its holding was necessary to ensure that claimants would be able to obtain a judicial hearing on the merits of their claims, this concern is adequately addressed by established rules of pleading and does not require the wholesale rewriting of legislation in which the court engaged.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING REQUIRING DE NOVO REVIEW OF AN ERISA PLAN FIDUCIARY'S DENIAL OF BENEFITS IS FLATLY INCONSISTENT WITH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE.

Every circuit, including the Third Circuit, has approved application of the "arbitrary and capricious" standard of judicial review to the typical denial of benefits by an ERISA plan fiduciary.[5] Neither the language nor the legislative history of ERISA permits any deviation from this general rule merely because the Third Circuit found Firestone to have a potential conflict of interest.

Deferential judicial review of benefits decisions is based on the fact that ERISA grants all fiduciaries discretion to make these decisions and subjects fiduciaries to trust-based standards. Combined with the flexible arbitrary and capricious standard of review, these fiduciary standards ensured that Firestone's benefits decision was free from any taint of self-interest or other impropriety. The district court applied the proper standard of review, and under that standard Firestone was entitled to summary judgment on plaintiffs' claim for termination pay.

5. *See, e.g., Palino v. Casey*, 664 F.2d 854, 858 (lst Cir. 198l); *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Benefit Plan*, 698 F.2d 593, 599 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 56 (3d Cir.), *cert. denied*, 106 S. Ct. 130 (1985); *Horn v. Mullins*, 650 F.2d 35, 37 (4th Cir. 198l); *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149-50 (6th Cir. 1985); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Quinn v. Burlington Northern Pension Plan*, 664 F.2d 675, 678 (8th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 654-55 (9th Cir. 198l); *Carter v. Central States, Southeast & Southwest Areas Pension Fund*, 656 F.2d 575, 576 (l0th Cir. 1981); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir.), *cert. denied*, 467 U.S. 1242 (1984); *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982). (The Federal Circuit has not ruled on this issue because it does not hear ERISA cases.)

A. ERISA Expressly Grants to Fiduciaries the Discretion To Decide Benefits Claims and Provides That the Actions of Those Fiduciaries Are Governed by Trust Principles, Which Include a Deferential Standard of Judicial Review.

ERISA is a "comprehensive and reticulated" statute that was enacted after more than a decade of studying the nation's employee benefit plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Recognizing that employers need not provide any employee benefits, Congress struck a balance in the statute between regulating existing benefit plans and tempering that regulation to encourage the development of new plans and the continuation and expansion of existing ones. *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981); *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985).

With respect to benefits decisions, this balance is reflected in a statutory scheme that grants to plan fiduciaries the discretion to make these decisions subject to stringent fiduciary standards. Fiduciaries' authority to make claims decisions, and the deferential standard of judicial review that necessarily follows, are clear from the language of the statute and are confirmed by its legislative history.

1. The language of ERISA gives fiduciaries the authority to make benefits decisions and invokes trust law concepts that require courts to review those decisions deferentially.

The grant of benefits discretion to fiduciaries

Section 402 of ERISA provides that a "named fiduciary" of the plan has "authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1). This

authority plainly includes the authority to decide benefits claims, as ERISA further provides in section 503(2) that a "full and fair review" of a claim denial shall be made by the named fiduciary. *Id.* § 1133(2).[6] Congress underscored the discretion that it had lodged in ERISA fiduciaries by defining the term "fiduciary" to include any person who "has any discretionary authority" with respect to a plan. *Id.* § 1002(21)(A). In short, an ERISA plan fiduciary has discretion to manage the operation of the plan, including the authority to "determin[e] the eligibility of claimants." *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2216; *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 142; *id.* at 153 & n.8 (Brennan, J., concurring).

It is axiomatic that courts must defer to those to whom decisionmaking authority has been committed. *See generally* Friendly, "Indiscretion About Discretion," 31 Emory L.J. 747 (1982). Refusal to defer would improperly substitute the court's judgment for that of the person who has both the duty and the rightful authority to decide.

Deference is particularly apt when the identity of the decisionmaker has been determined by Congress. In *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 246 (1971), this Court concluded that because the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5), gave unions decisionmaking authority with respect to member discipline, a federal district court could not overturn a disciplinary decision as long as there was "some evidence" to support it. The Court held that "a stricter standard . . . would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs. . . ." *Id.; see also United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364, 370 (1987) (courts are to defer to private settlement of labor disputes). Under the reasoning of *Hardeman*, a non-deferential standard could not possibly be consistent with ERISA in light of that statute's explicit command that the named fiduciary shall have authority to make benefits decisions. *See Holland v. Burlington Industries*, 772 F.2d 1140, 1148 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) (benefits decisions involving ERISA plans are to be reviewed deferentially because Congress intended eligibility disputes to "rest with administrators whose experience is daily and continual, not with judges whose experience is episodic and occasional").[7]

6. *See* Staff of Comm. of House & Senate Conferees on H.R. 2, 93d Cong., 2d Sess., *Summary of Differences Between the Senate Version and the House Version of H.R. 2 To Provide for Pension Reform, Part Three, Fiduciary and Enforcement ("Conferees' Staff Summary")* 13 (Comm. Print 1974), *reprinted in* 3 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974 ("Legislative History")* 5249, 5263 (Comm. Print 1976) (fiduciary's authority includes authority to "establish a committee to direct and supervise benefit payments"); *see also* 29 C.F.R. § 2509.75-8 D-3 (Department of Labor interpretive bulletin noting that an individual who has "the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits" is a fiduciary).

The authority to make benefits decisions is also demonstrated by section 405(c) of ERISA, 29 U.S.C. § 1105(c), which provides that a named fiduciary may delegate certain powers to other fiduciaries. Among those powers is the authority "with respect to payment of benefits." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 301 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5081, *and in* 3 *Legislative History* 4277, 4568.

The incorporation of trust law

It is beyond question that under ERISA employee benefit plans are to be governed by trust law. The people who manage the plans and who are or may become eligible for benefits are not referred to as parties to a contract but rather as "fiduciaries" and "beneficiaries" or "participants." 29 U.S.C. § 1002(21)(A), (8), & (7). Moreover, plan fiduciaries' authority to act is circumscribed by Part 4 of the statute, which is entitled "Fiduciary Responsibility" and contains a series of fiduciary standards.

7. For cases deferring to an administrative decisionmaker when a statute grants him discretion, see *INS v. Abudu*, 108 S. Ct. 904, 913 (1988); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975).

The most important of these standards is the requirement in section 404(a)(1) that a fiduciary act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).[8] This "sole benefit" standard tracks the classic statement of a common law trustee's duty to administer the trust "solely in the interest of the beneficiary." Restatement (Second) of Trusts § 170 (1959). Section 403(a) of ERISA also provides that "all assets of an employee benefit plan shall be held in trust by one or more trustees." 29 U.S.C. § 1103(a).[9]

In providing that ERISA plan assets be "held in trust" and that fiduciaries be subject to a "sole benefit" standard, Congress incorporated not only trust law terms but also the "accumulated settled meaning" of those terms. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 152-53 & n.6 (Brennan, J., concurring); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. 559, 570-74 (1985). Part of that settled meaning is that a trustee's actions are subject to review only for an abuse of discretion:

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

Restatement (Second) of Trusts § 187; *see also* III A. Scott & W. Fratcher, *Scott on Trusts* ("*Scott on Trusts*") § 187 at 14-17 (4th ed. 1988). This standard of review has long been applied to the trustee's determination whether a beneficiary has fulfilled the conditions required for payment of benefits from the trust. III *Scott on Trusts* § 187.2 at 33-34.

8. ERISA further specifies components of this fiduciary duty, including the duty to adhere to the language of the plan. *See* 29 U.S.C. § 1104(a)(1)(D).

9. Although this provision speaks in terms of plan "assets," it was intended to apply to unfunded as well as funded plans. The provision explicitly exempts a limited class of unfunded plans and permits the Secretary of Labor to exempt all unfunded plans from its scope. 29 U.S.C. § 1103(b)(6) & (4). Unfunded plans that are not exempted are obviously included. *See Andrus v. Allard*, 444 U.S. 51, 56-57 (1979).

Congress' intent to incorporate the trust law standard of review in ERISA is also demonstrated by its use of certain language from other employee benefits legislation that courts had previously construed to require adoption of this standard. Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), governs union benefit plans to which employers make contributions. That statute, like ERISA, provides that the assets of the plan are "held in trust" and requires that the trustees act "for the sole and exclusive benefit of the employees." *Id.* Long before the adoption of ERISA in 1974, lower courts had held that the benefits decisions of LMRA trustees could be set aside only if the trustees "acted arbitrarily or capriciously." *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 (1982) (quoting *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964)).[10] The early cases under the LMRA determined the appropriate standard of review by turning to the common law of trusts, the same law that Congress incorporated into ERISA.

The Congress that enacted ERISA was intimately familiar with section 302(c)(5) of the LMRA and plainly understood the similarity of the two statutes' fiduciary standards.[11] This Court has already recognized that Congress specifically

10. *See generally Lee v. Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1972); *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969); *Pavlovscak v. Lewis*, 190 F. Supp. 205, 209 (W.D. Pa. 1960), *aff'd per curiam*, 295 F.2d 39 (3d Cir. 1961); *Wilburn v. Steamship Trade Association*, 376 F. Supp. 1228, 1239-40 (D. Md. 1974); *Patterson v. UMW Welfare & Retirement Fund of 1950*, 346 F. Supp. 11, 13 (E.D. Tenn. 1971); *Barlowe v. Roche*, 161 A.2d 58, 63 (D.C. 1960); *Bono v. Kramer*, 346 Mass. 355, 191 N.E.2d 760, 764 (1963); *Judge v. Kortenhaus*, 79 N.J. Super. 574, 192 A.2d 320, 327-28 (Ch. Div. 1963); *Occidental Life Insurance Co. v. Blume*, 65 Wash. 2d 643, 399 P.2d 76, 79 (1965).

11. The connection between ERISA and the LMRA goes beyond the similarity in fiduciary standards. The bill that eventually became ERISA began as a proposed amendment to the LMRA. *See* S. 2352, 89th Cong., 2d Sess., 111 Cong. Rec. 19,072 (1965). ERISA defines an employee benefit plan in part by an explicit reference to section 302(c) of the LMRA. *See* 29 U.S.C. § 1002(1)(B). And ERISA is replete with references to collectively bargained plans that are jointly administered by an employer and a union, as section 302(c)(5) plans are required to be. *See, e.g.*, 29 U.S.C. §§ 1002(1) & (2)(A), 1003(a)(3), 1321(a)(1)(C), and 1403(b)(4).

intended to import into ERISA the substantial body of law that had been developed under the LMRA. *NLRB v. Amax Coal Co.*, 453 U.S. at 332; *see also Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987). If Congress had not intended that body of law to include the arbitrary and capricious standard of review that LMRA cases had uniformly borrowed from the common law of trusts, "Congress most certainly would have said so." *Traynor v. Turnage*, 108 S. Ct. 1372, 1381 (1988); *accord Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986).

2. The legislative history of ERISA confirms that Congress intended courts reviewing fiduciaries' benefits decisions to apply a deferential standard.

The historical development of ERISA confirms that Congress intended benefits decisions to be committed to the authority of fiduciaries who would be subject to standards that had been developed in the common law of trusts. The legislative history also emphasizes that Congress' decision on this issue was part of the overall balance it struck in ERISA

> between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of workers for a level of protection which will adequately protect their rights and just expectations.[12]

12. H.R. Rep. No. 533, 93d Cong., 1st Sess. 9 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4647, *and in* 2 *Legislative History* 2348, 2356; S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4850, *and in* 1 *Legislative History* 587, 599; *see also* 120 Cong. Rec. 29,198 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5167, *and in* 3 *Legislative History* 4673 (statement of Rep. Ullman, a senior House Manager on the Conference Committee, while introducing the Conference Report: "plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill").

The development of fiduciaries' benefits discretion

One of the issues that Congress had to resolve in enacting ERISA was how to allocate the authority to make benefits decisions. The bill passed by the Senate and sent to the Conference Committee had no provision comparable to what eventually became section 402 of ERISA, which grants this authority to fiduciaries. *See* H.R. 2 in the Senate, 93d Cong., 2d Sess. § 511, 120 Cong. Rec. 4977, 4997 (1974), *reprinted in* 3 *Legislative History* 3599, 3772. Instead, the bill provided for arbitration of disputes between plan participants and plan administrators, including disputes about benefits. The arbitration and judicial review of the arbitrator's decision were to be conducted under the law that had been developed under section 301 of the LMRA, 29 U.S.C. § 185. H.R. 2 in the Senate § 691(a)(1) & (d), 120 Cong. Rec. at 5001, *reprinted in* 3 *Legislative History* at 3813-14. The bill also provided that "in lieu of" submitting the dispute to arbitration, the participant or beneficiary could maintain a civil action for breach of fiduciary duty. *Id.* § 691(b).[13]

In contrast, the bill originally passed by the House on

13. Earlier versions of a Senate Finance Committee bill had provided for review of benefits denials by an administrative agency. *See* S. 1179, 93d Cong., 1st Sess. § 602 (1973), *reprinted in* 1 *Legislative History* 780, 988-90; S. Rep. No. 383, 93d Cong., 1st Sess. 116-17 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4999-5000, *and in* 1 *Legislative History* 1063, 1184-85. In contrast to S. 1179, the Javits proposal that was reported out of the Senate Committee on Labor and Public Welfare provided for "full and fair review" of a benefits denial by the plan administrator. S. 4, 93d Cong., 1st Sess. § 510, 119 Cong. Rec. 29,890, 29,900 (1973), *reprinted in* 1 *Legislative History* 389, 576. The arbitration provision in the final Senate bill was the result of a compromise between S. 4 and S. 1179. 119 Cong. Rec. 30,037 (1973), *reprinted in* 2 *Legislative History* 1623 (statement of Sen. Nelson of the Finance Committee). An amendment to reinsert the administrative review provision into the compromise bill was defeated on the floor. Proposed Amendment No. 482 to S. 4, 93d Cong., 1st Sess., 119 Cong. Rec. 29,563 (1973), *reprinted in* 1 *Legislative History* 1245; 119 Cong. Rec. 30,401 (1973), *reprinted in* 2 *Legislative History* 1838.

February 28, 1974 contained the language that eventually became section 402 of ERISA and also defined the term "fiduciary" to include persons who exercise discretion. H.R. 2 in the House, 93d Cong., 2d Sess. §§ 111(a)(1), 2(21)(A) (1974), *reprinted in* 3 *Legislative History* 3898, 3947, 3910; *see Conferees' Staff Summary* 12-13, *reprinted in* 3 *Legislative History* 5249, 5262-63. The House bill had no provision for arbitration of disputes; instead, it contained civil enforcement provisions very similar to those in section 502(a) of ERISA, 29 U.S.C. § 1132(a). H.R. 2 in the House § 503(e), *reprinted in* 3 *Legislative History* at 4047.[14]

The grant of discretion in what eventually became section 402 of ERISA was accepted by the Conferees, and the Senate provision regarding arbitration of benefits disputes was rejected "on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes." 120 Cong. Rec. 29,941 (1974), *reprinted in* 3 *Legislative History* 4769 (statement of Sen. Javits, a sponsor of ERISA, summarizing and explaining the actions of the Conference Committee). The Conferees agreed instead that the plan would provide a claims procedure in which "full and fair review" of a benefits claim would be made by the named fiduciary. A disappointed claimant could then seek review of the named fiduciary's decision in court under enforcement provisions modeled on those in the House bill. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 326, 328 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5106, 5108, *and in* 3 *Legislative History* 4277, 4593, 4595.

Thus, Congress made an explicit decision to give fiduciaries the discretion to decide benefits claims and rejected attempts to take claims authority away from fiduciaries. Moreover, Congress determined that review of a fiduciary's decision under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), of ERISA would be a less expensive means of resolving a benefits dispute than arbitration of the dispute plus deferential judicial review of the arbitrator's decision. The de novo review under section 502(a)(1)(B) adopted by the Third Circuit is inconsistent with these congressional determinations.

14. Section 503(e)(1)(B) of the House bill provided for civil actions by a participant or beneficiary "to recover benefits due him under the terms of his plan or to clarify his right to future benefits under the terms of the plan." *Compare* 29 U.S.C. § 1132(a)(1)(B).

The adoption of trust law

The statutory intent to apply a deferential standard of review to fiduciaries' benefits decisions is also confirmed by Congress' consistent affirmations in the legislative history that these "fiduciaries" were subject to the responsibilities and standards developed in the common law of trusts. The intent to apply trust law (which includes a deferential standard of judicial review) to employee benefit plans dates back to Congress' first attempts at regulation in this area in section 302(c)(5) of the LMRA. That statute's chief sponsor, Senator Taft, noted that the legislation was necessary to ensure that all employee benefit plans would be treated as "trusts" subject to supervision in a court of chancery. 93 Cong. Rec. 4753 (1947); *see generally NLRB v. Amax Coal Co.*, 453 U.S. at 331.

Congress again invoked the common law of trusts when it broadened the scope of federal regulation of employee benefit plans in 1958 in the Welfare and Pension Plans Disclosure Act ("WPPDA").[15] An early report on abuses in plan administration found a need for a federal disclosure statute to give employees the information necessary to enforce their rights under existing state trust law. S. Rep. No. 1734, 84th Cong., 2d Sess. 8, 67-68 (1956). Reviewing some of the state protections, the report noted with approval a decision which held that a court may "intervene to control . . . an unreasonable exercise of discretion." *Id.* at 66 (citing *Forrish v. Kennedy*, 377 Pa. 370, 105 A.2d 67 (1954)).

The next Congress saw the passage of bills in both the Senate and the House providing for disclosure of information

15. Pub. L. No. 85-836, 72 Stat. 997 (1958), *amended by* Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, 76 Stat. 35 (1962) (formerly codified at 29 U.S.C. §§ 301 *et seq.*), *repealed by* section 111(a)(1) of ERISA, 29 U.S.C. § 1031(a)(1).

and for a federal accounting remedy. *See* S. 2888, 85th Cong., 2d Sess., 104 Cong. Rec. 7524 (1958); H.R. 13507, 85th Cong., 2d Sess., 104 Cong. Rec. 16,435, 16,448 (1958). The reports accompanying these bills made clear that "the managers of these plans bear a fiduciary relationship to the employees" and that "the employees should be given the same rights as the beneficiaries of formal trusts." S. Rep. No. 1440, 85th Cong., 2d Sess. 12 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4137, 4147; *see also* H.R. Rep. No. 2283, 85th Cong., 2d Sess. 5 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4181, 4185.

The floor debates on the bills that culminated in the enactment of WPPDA contained numerous references to the law of trusts, including references by the co-sponsor of the Senate bill to the need to prevent "abuse of [the trustee's] office" or "abuse [of] trust." 104 Cong. Rec. 7053, 7063 (1958) (statements of Sen. Douglas); *see also id.* at 7187, 7232 (statements of Sen. Cooper); *id.* at 7517 (statement of Sen. Smith). The debates also contained references to section 302(c)(5) of the LMRA, which was described as a statute designed to provide "protection against the arbitrary and capricious acts of those administering these funds." 104 Cong. Rec. 7191 (1958) (statement of Sen. Allott); *see also id.* at 7189 (statement of Sen. Allott). Although the House bill prevailed in 1958, Congress strengthened WPPDA with amendments in 1962, essentially adopting the proposals rejected from the original bill passed by the Senate because "abuses of the trust relationship continue[d] to be uncovered." 107 Cong. Rec. 18,262 (1961) (statement of Rep. Roosevelt).

Given the historical development of federal regulation of employee benefit plans, it is hardly surprising that in ERISA Congress again incorporated the common law of trusts to define the scope of fiduciaries' substantive authority and responsibility. Reports on both the House and Senate bills stated that "[t]he fiduciary responsibility section . . . codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts."[16] As we have already demonstrated, a prominent part of that common law is the application of an abuse of discretion or arbitrary and capricious standard, a standard that Congress has recognized was applicable since at least the first report on WPPDA.

Subsequent rejection of the de novo standard

Finally, if Congress believed that the courts' consistent application of the arbitrary and capricious standard was inappropriate under ERISA, it could have amended the statute. In fact, such an amendment was introduced but never enacted. The amendment would have modified section 502 of ERISA to provide for de novo review of decisions denying benefits. *See* H.R. 6226, 97th Cong., 2d Sess. (1982), *reprinted in Pension Legislation: Hearings Before the Subcomm. on Labor Management Relations of the House Comm. on Labor and Education*, 97th Cong., 2d Sess. 60 (1982). The amendment's sponsor, Representative Frank, stated that its purpose was to correct what he perceived to be the "injustice" of the courts' application of the arbitrary and capricious standard. *Pension Legislation Hearings* at 150.[17] The amendment was referred to committee but never endorsed by other legislators or reported back to the full House. This inaction by a later Con-

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16. H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649, *and in* 2 *Legislative History* 2348, 2358; S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865, *and in* 1 *Legislative History* 587, 615; *accord* 120 Cong. Rec. 29,932 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5186, *and in* 3 *Legislative History* 4743 (statement of Sen. Williams, a sponsor of ERISA, introducing the Conference Report); 120 Cong. Rec. 29,196 (1974), *reprinted in* 3 *Legislative History* 4668 (statement of Rep. Dent, a House Manager on the Conference Committee, during debate on the Conference Report); *see also* S. Rep. No. 383, 93d Cong., 1st Sess. 95 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4978, *and in* 1 *Legislative History* 1069, 1163 ("the term 'trust' . . . means plan, whether or not in trust form").

17. When the bill was introduced, the courts of appeals had already determined that the arbitrary and capricious standard was applicable. *See supra* p. 8 n.5.

gress with respect to change of the arbitrary and capricious standard is "instructive" with regard to the intent of Congress in enacting ERISA. *See Bowsher v. Merck & Co.*, 460 U.S. 824, 837-38 n.12 (1983).

In sum, the legislative history under ERISA reinforces the conclusion compelled by the language of the statute. As part of its intent to encourage the expansion of private benefit plans, Congress deliberately allocated the authority to make benefits decisions to plan fiduciaries as opposed to arbitrators or administrative agencies. At the same time, in order to protect employees' rights to benefits, Congress has consistently treated all employee benefit plans as "trusts" subject to trust principles—including a deferential standard of judicial review—and specifically incorporated those principles into ERISA just as it did in the LMRA.

B. ERISA Provides No Basis for Altering the Standard of Review When a Fiduciary Has a Conflict of Interest That Arises Merely Because He Must Make a Benefits Decision.

The Third Circuit did not deny that the abuse of discretion standard is generally applicable to ERISA plan fiduciaries' benefits decisions. The court held, however, that when a fiduciary has a potential conflict of interest, his authority to make benefits decisions should be revoked and the claim for benefits determined de novo in the district court. (A15) This holding is not only contrary to that of every other circuit that has considered the issue[18] but is also inconsistent with the

18. *See, e.g.*, *Schwartz v. Newsweek*, 827 F.2d 879, 881 (2d Cir. 1987); *Holland v. Burlington Industries*, 772 F.2d 1140, 1148-49 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623, 626 (6th Cir. 1987) (reviewing this plan); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Pabst Brewing Co. v. Anger*, 784 F.2d 338, 338 (8th Cir. 1986) (per curiam); *Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-21 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *see also Arnold v. Babcock & Wilcox Co.*, 154 Ill. App. 3d 863, 507 N.E.2d 218, 222 (1987). Each of these cases applied the arbitrary and capricious standard to review an employer fiduciary's denial of termination pay under an unfunded benefit plan, precisely the situation in this case

rationales for the general rule that Congress adopted.

This case presents the most common example of a potential conflict of interest: an unfunded benefit plan established and maintained by the employer "so that any benefits provided by the plan are paid directly by the employer out of its general corporate funds." (A7) However, the court of appeals' holding also applies to other potential conflict situations: the examples it gives are (1) where "there is no assurance of the trustee's impartiality" similar to that provided by the equal representation requirement of section 302(c)(5) of the LMRA (A21) and (2) where "the employer's contributions [to a funded plan] in a given year are determined by the cost of satisfying plan liabilities in the prior year" (A7). These situations are so pervasive in employee benefit plans that the court's "exception" would soon swallow the general rule under which courts are to apply a deferential standard of review.[19]

The court of appeals' reasoning and holding on the standard of review issue were based completely on a "policy analysis" without any effort to determine statutory intent. *Cf. UMW Health & Retirement Funds v. Robinson*, 455 U.S. at 573 (court of appeals erred by failing to "ground its holding on the text or legislative history of § 302(c)(5)"). If the court had made the proper analysis, it would have quickly perceived that its decision to abolish the benefits discretion of a large number of plan fiduciaries flatly contradicts the very language of ERISA.

ERISA does not vary the fiduciary's authority to make benefits decisions or the standards limiting that authority

19. There are approximately 4.5 million employer-sponsored welfare benefit plans in this country, as opposed to nearly 800,000 pension benefit plans. Pension & Welfare Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act 1986 Report to Congress* i. Welfare plans are exempt from ERISA's funding requirements. 29 U.S.C. § 1081(a)(1). Moreover, "defined benefit" plans, in which contributions are actuarially determined based on the benefits expected to become payable, hold approximately 70% of the assets of all private pension plans. R. Ippolito, *Pensions, Economics and Public Policy* 81 (1986).

based on either the type of fiduciary or the funding of the plan. Moreover, just as is the case under traditional principles of trust law, the statute explicitly permits an employer or other party in interest to serve as a fiduciary notwithstanding his potential conflict of interest. Thus, there is no justification for varying the standard of review merely because of that potential conflict.

1. ERISA'S fiduciary provisions, including the grant of authority to decide benefits claims, apply equally to all plans, no matter by whom administered and whether funded or not, and despite any potential conflict of interest.

ERISA expressly provides that fiduciaries have authority to make benefits decisions and that the same set of fiduciary standards applies regardless of whether the plan is jointly administered or funded. Congress' inclusion of employer administered and unfunded plans was the result of a conscious decision, as evidenced both by Congress' invocation of those distinctions in other provisions of the statute (but not in the fiduciary responsibility provisions) and by the legislative history. Congress also recognized that a potential conflict of interest could arise when an employer served as the fiduciary of his own plan and provided in section 408(c)(3) of ERISA, 29 U.S.C. § 1108(c)(3), that this potential conflict did not violate the specific conflict of interest prohibitions in the statute. ERISA thus provides no basis for altering the standard of review where, as here, the evidence shows that an employer fiduciary of an unfunded plan was guilty of nothing more than fulfilling his statutory obligation of making a benefits decision.

The language of ERISA makes plain, contrary to the court of appeals' conclusion, that the scope of a fiduciary's benefits discretion is not determined by whether the plan is jointly administered. Section 402(a) of ERISA expressly provides that "one or more named fiduciaries jointly or severally shall have authority" to make benefits decisions. 29 U.S.C. § 1102(a). More generally, Part 4 of ERISA, entitled "Fiduciary Responsibility," contains both the section 402 grant of discretion to fiduciaries and the limitations on that grant in section 404 and elsewhere. Congress expressly provided that Part 4 of ERISA applies to all employee benefit plans, whether established and maintained by an employer, a union, or both. 29 U.S.C. § 1101(a); *see id.* § 1003(a).[20] Congress even included a special provision stating that courts should not construe the fiduciary standards to prohibit an employer's agent or representative from serving as a fiduciary. 29 U.S.C. § 1108(c)(3). Although Congress refused to invoke the employer administered/jointly administered distinction in the fiduciary responsibility provisions, Congress in fact made other provisions of ERISA turn on that distinction. *See, e.g.*, 29 U.S.C. §§ 1051(2), 1081(a)(3), 1321(b)(8).

Congress also made a conscious decision that the fiduciary standards of ERISA would govern the conduct of fiduciaries of unfunded benefit plans. Part 4 applies to "any employee benefit plan" (*see* 29 U.S.C. § 1101(a)), including welfare benefit plans, which need not be funded (*id.*

20. The inclusion of employer administered plans certainly was not inadvertent. One of the major studies relied upon by Congress in enacting ERISA revealed that 61% of the plans surveyed were employer administered. *See* Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Statistical Analysis of Major Characteristics of Private Pension Plans* 31 (Comm. Print 1972).

Similar statistics were relied upon by Congress in enacting WPPDA. *See* H.R. Rep. No. 2283, 85th Cong., 2d Sess. 9 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4181, 4188 ("employer-administered plans predominate" and "include approximately 92 percent of all employees covered by welfare plans and 86 percent of all those covered by pension plans"). Congress also explicitly determined to provide the protections of WPPDA to all plans, regardless of whether they were administered by an employer, a union, or both. *See* the authorities cited *supra* pp. 17-18; *see also* 104 Cong. Rec. 16,431 (1958) (statement of Rep. Green). According to one commentator who served as minority counsel for pensions to the Senate Committee on Labor and Public Welfare and participated in the drafting of ERISA, one reason for the all-inclusive approach in both WPPDA and ERISA was to avoid dissension between management and labor forces. Gordon, "Overview: Why Was ERISA Enacted?," *reprinted in* Senate Comm. on Labor and Public Welfare, *The Employee Retirement Income Security Act of 1974: The First Decade* 1, 7, 11 (Comm. Print 1984).

§ 1081(a)(1)).[21] Although the funded/unfunded distinction was not invoked to define the coverage of the fiduciary responsibility provisions, it is one of the most important classifications in ERISA and is used throughout the statute. *See* 29 U.S.C. §§ 1051(1) & 1081(a)(1); *see also id.* §§ 1051(2) & (8), 1081(a)(3) & (10), 1103(b)(6), 1112(a)(1).

The language of the statute also removes any doubt whether Congress intended the fiduciary provisions to apply to plans that were *both* employer administered and unfunded. ERISA expressly exempts from the fiduciary provisions a limited class of unfunded plans maintained by an employer "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1101(a)(1); *see* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 296 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5076-77, *and in* 3 *Legislative History* 4277, 4563. Congress clearly contemplated that all other unfunded plans maintained by an employer would be subject to the fiduciary provisions. *See Andrus v. Allard*, 444 U.S. at 56-57.

ERISA thus makes plain that fiduciaries have authority to make benefits decisions and are subject to the same set of

21. Congress' inclusion of plans that are exempted from the funding provisions of ERISA was also deliberate. Original versions of the bill that eventually became ERISA applied the fiduciary provisions only to funded plans. *See, e.g.*, S. 2352, 89th Cong., 2d Sess., 111 Cong. Rec. 19,072 (1965); S. 2627, 89th Cong., 2d Sess., 111 Cong. Rec. 26,630 (1965); *see also* S. 1024, 90th Cong., 1st Sess. § 14(b)(1) (1967) (containing specific exemption from fiduciary provisions for unfunded plans). Even the bill first passed by the Senate applied the fiduciary standards only to "funds," *i.e.*, "only to those funds which leave assets at risk." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4866, *and in* 1 *Legislative History* 587, 616; *see* H.R. 2 in the Senate, 93d Cong., 2d Sess. § 511, 120 Cong. Rec. 4977, 4997 (1974), *reprinted in* 3 *Legislative History* 3599, 3772. The House bill prevailed on this issue, however, and the statute as enacted applied the fiduciary provisions not only to "funds" but to all "plans." 29 U.S.C. § 1101(a); *see* H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4650, *and in* 2 *Legislative History* 2348, 2359; H.R. 2 in the House, 93d Cong., 2d Sess. § 111 (1974), *reprinted in* 3 *Legislative History* 3898, 3947.

fiduciary standards regardless of whether the plan is jointly administered or funded. Congress' refusal to invoke these distinctions is particularly telling given the repeated use of the distinctions in other provisions of the statute. The courts may not read into the fiduciary responsibility provisions the very distinctions that Congress refused to draw there. *See Malone v. White Motor Corp.*, 435 U.S. 497, 508-09 (1978) (because "neither [WPPDA] as enacted nor its legislative history drew a distinction between collectively bargained and all other plans," courts may not do so); *see also Russello v. United States*, 464 U.S. 16, 23 (1983); *Andrus v. Allard*, 444 U.S. at 56-57; *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 102-03 (1820) (Marshall, C.J.).[22] It is particularly important for courts to adhere to the distinctions Congress drew and refused to draw in ERISA because of the attention Congress paid to the intricacies of the legislation. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 147; *see Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. at 361.

Like the court of appeals, Congress was very concerned with the problem of self-dealing by plan fiduciaries. ERISA contains comprehensive and detailed prohibitions on conflict of interest transactions in sections 406 and 407, 29 U.S.C. §§ 1106 and 1107, including a proscription on a fiduciary

22. Before ERISA became effective, the decisions of employers who administered plans that were not governed by the LMRA were reviewed under the arbitrary and capricious standard. *See, e.g.*, *Reese v. Administrative Committee of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 32 Cal. Rptr. 818, 820 (1963); *Kloman v. Doctors Hospital*, 76 A.2d 782, 785 (D.C. 1950); *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E.2d 858, 864 (1965); *accord Western Union Telegraph Co. v. Robertson*, 146 Ark. 406, 225 S.W. 649, 652 (1920); *Smith v. New England Telephone & Telegraph Co.*, 109 N.H. 172, 246 A.2d 697, 698 (1968); *Gitelson v. DuPont*, 17 N.Y.2d 46, 215 N.E.2d 336, 337 (1966); *Oiler v. Dayton Reliable Tool & Manufacturing Co.*, 42 Ohio App. 2d 26, 326 N.E.2d 691, 694-95 (1974); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762, 763-64 (Okla. 1955); *Garner v. Girard Trust Bank*, 442 Pa. 166, 275 A.2d 359, 361 (1971); *Neuhoff Brothers Packing Management Corp. v. Wilson*, 453 S.W.2d 472, 474 (Tex. 1970). These decisions were based on trust law or on the contractual grant of discretion to the employer administrators—discretion that is now lodged in employer administrators by the very terms of ERISA.

"act[ing] in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interest of the [plan's] . . . participants or beneficiaries." *Id.* § 1106(b)(2).[23] Unlike the court of appeals, however, Congress concluded that a *potential* conflict of interest did not give rise to the same concern as *actual* self-dealing. Thus, section 408(c)(3) of ERISA provides that the proscriptions on conflict of interest transactions shall not "be construed to prohibit any fiduciary from . . . serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest." *Id.* § 1108(c)(3).[24]

Section 408(c)(3) does not exempt a fiduciary from the conflict of interest proscriptions; it merely provides that the fact that he is the representative of a party in interest shall not be construed as a violation of those prohibitions. *NLRB v. Amax Coal Co.*, 453 U.S. at 333 n.16. The statutory scheme thus permits the representative of an interested party to exercise his statutory discretion until such time as there is *evidence* that his "actual goal" was to promote the interests of the party who appointed him rather than those of the plan's participants and beneficiaries. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S.

23. Indeed, the Third Circuit had matters precisely backwards when it concluded that ERISA provides "no assurance of the trustee's impartiality" (A21) comparable to the "elaborate" equal representation requirement of the LMRA (A15). Congress enacted the detailed and stringent fiduciary standards of ERISA and applied those standards to all plans because of the absence of adequate safeguards under then existing law, including the LMRA. *See, e.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. 4-5 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4841, *and in* 1 *Legislative History* 587, 590-91; Staff of General Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess., *Interim Staff Report of Activities of the Pension Study Task Force* 58 (Comm. Print 1972). In any event, this Court has frequently observed that the equal representation requirement was intended to prevent plan abuses by unions in asset management and investment, not to ensure impartiality in benefits decisions. *See, e.g.*, *UMW Health & Retirement Funds v. Robinson*, 455 U.S. at 571-72; *NLRB v. Amax Coal Co.*, 453 U.S. at 330 n.13; *Arroyo v. United States*, 359 U.S. 419, 426 (1959); 93 Cong. Rec. 4678 (1947) (remarks of Sen. Ball); *id.* at 4746 (remarks of Sen. Taft); *see also infra* p. 28 n.27.

24. The term "party in interest" includes, *inter alia*, "an employer any of whose employees are covered by such plan." 29 U.S.C. § 1002(14)(C).

at 571 n.12; *see also Brown v. Retirement Committee of the Briggs & Stratton Retirement Plan*, 797 F.2d 521, 526 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1311 (1987); *In re Vorpahl*, 695 F.2d 318, 320 n.4 (8th Cir. 1982).[25] Where, as here, all the employer did was to decide whether claimants were entitled to benefits under the language of the plan, there is no basis for refusing to defer to that reasonable decision.

2. Under the common law of trusts, courts apply an abuse of discretion standard even when the trustee has a conflict of interest.

The ultimate source of the fiduciary standards of both ERISA and the LMRA is the common law of trusts. Despite this well-known fact, the court of appeals' adoption of a de novo standard of review when a fiduciary has a potential conflict was based on the court's conclusion that contract law should apply. (*See* A25-A26) The court's decision to reject application of trust law is completely unsupportable under ERISA. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. at 570-74; *NLRB v. Amax Coal Co.*, 453 U.S. at 329; *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 152 (Brennan, J., concurring).[26]

25. An employer fiduciary of an unfunded (or defined benefit) plan also does not violate the "sole benefit" rule merely by denying a benefit claim. Present claimants, future claimants, and the employer all share a "common interest" in the "financial integrity of the plan." *See Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 142 n.9. Indeed, the requirement that the fiduciary consider the interests of all plan participants, not only the interests of present claimants, is one reason why the fiduciary is given discretion to make benefit decisions. *See Holland v. Burlington Industries*, 772 F.2d at 1148-49; *Jung v. FMC Corp.*, 755 F.2d at 711-12.

26. Every court of appeals that has ruled on the question has concluded that claimants are not entitled to a jury trial under ERISA because their rights are governed by trust rather than contract law and because ERISA grants benefits decision authority to plan fiduciaries. *See, e.g.*, *Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Turner v. CF & I Steel Corp.*, 770 F.2d 43, 47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir.

Moreover, the applicable trust law principles require deference to a fiduciary's decision even when the fiduciary has a conflict of interest. The Third Circuit declined to apply a trust-based deferential standard to Firestone's denial of termination pay because, in the court's view, that standard does not apply under the common law of trusts when the trustee is alleged to have a conflict of interest. (A15, A22) However, the Restatement (upon which the court purported to rely) makes it clear that the existence of a conflict of interest does *not* alter the abuse of discretion standard but is merely to be weighed as a "factor in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187 Comment d. This conclusion is supported by the leading treatise on the common law of trusts, which provides that a trustee's conflict of interest is merely one of many circumstances that "may be relevant" when the court determines whether the trustee is acting "within the bounds of a reasonable judgment." III *Scott on Trusts* § 187 at 15.[27]

Application of a deferential standard of review is particularly appropriate where the settlor of the trust was aware of the conflict of interest but nonetheless conferred discre-

1980); *Crews v. Central States, Southeast & Southwest Areas Pension Fund*, 788 F.2d 332, 338 (6th Cir. 1986); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *In re Vorpahl*, 695 F.2d 318, 320 (8th Cir. 1982); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985); *Chilton v. Savannah Foods & Industries*, 814 F.2d 620, 623 (11th Cir. 1987).

27. The Third Circuit was plainly wrong when it concluded that early cases under the LMRA "discussed the impartiality of the LMRA decision makers, and . . . relied on that impartiality in settling on the arbitrary and capricious standard." (A16) Of the four cases discussed by the court of appeals, two did not even mention the equal representation requirement. *See Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958); *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958). The other two decisions mentioned the existence of the requirement but did not rely on it in determining the proper standard. *Kennet v. UMW*, 183 F. Supp. 315, 317-18 (D.D.C. 1960); *Horn v. Lewis*, 79 F. Supp. 541, 544 (D.D.C. 1948). Ironically, the first decision on the issue from the District of Columbia Circuit quoted at length from section 302(c)(5) but *omitted* that portion requiring equal representation. *See Danti v. Lewis*, 312 F.2d 345, 346 (D.C. Cir. 1962).

tionary power on the trustee. When the settlor has thus sanctioned the conflict, the trustee "will not be penalized when he has acted in good faith and in a manner he believes was for the best interest of the trust." *Bank of Nevada v. Speirs*, 95 Nev. 870, 603 P.2d 1074, 1077 (1979), *cert. denied*, 449 U.S. 994 (1980).[28]

The rationale of these cases is directly applicable to the analysis of congressional intent in enacting ERISA. Despite its knowledge of the potential conflict of interest that would arise, Congress unquestionably intended employers to serve as fiduciaries of ERISA plans and to exercise the full degree of their discretion in such capacity. In fact, Congress *required* employers to act as fiduciaries by serving as plan administrators in certain circumstances. *See* 29 U.S.C. § 1002(16)(A)(ii). Congress thus must be viewed as having sanctioned the potential conflict, and the standard of review may not be altered.

The common law requires that the plaintiff produce *evidence* that the trustee's decision *in fact* was motivated by an improper purpose. Restatement (Second) of Trusts § 187 Comment g; *see also id.* § 170 Comment t; *id.* § 107 Illustration 1; III *Scott on Trusts* § 187.5 at 46-47. The common law thus mirrors precisely the provisions of ERISA. *See supra* pp. 25-27. Both sources of law permit a fiduciary who has a conflict of interest to exercise his authority to make a benefits decision in the absence of evidence that the decision was in fact motivated by self interest.

28. *Accord Rafferty v. Parker*, 241 F.2d 594 (8th Cir. 1957); *Gregory v. Moose*, 266 Ark. 86, 590 S.W.2d 665 (Ark. App.), *petition denied*, 267 Ark. 86, 590 S.W.2d 662 (1979); *Estate of Gilliland*, 140 Cal. Rptr. 795, 73 Cal. App. 3d 515 (1977); *Lovett v. Peavy*, 253 Ga. 79, 316 S.E.2d 754 (1984); *Goldman v. Rubin*, 292 Md. 693, 441 A.2d 713 (1982); *Svenson v. First National Bank*, 5 Mass. App. Ct. 440, 363 N.E.2d 1129 (1977); *Rosencrans v. Fry*, 12 N.J. 88, 95 A.2d 905 (1953); *In re Schnur's Estate*, 39 Misc. 2d 888, 242 N.Y.S.2d 126 (Surrogate's Ct. 1963); *In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411 (1950); *see also* II *Scott on Trusts* § 99.3 at 63-64; *id.* § 107.1 at 120; IIA *Scott on Trusts* § 170.23A at 429.

C. The Fiduciary Obligations of ERISA and the Arbitrary and Capricious Standard Provide Adequate Protection for Employee Benefits.

The adoption of a deferential standard of review under ERISA does not leave employees' benefits unprotected. ERISA provides a plethora of substantive constraints on fiduciaries' actions that together with the flexible arbitrary and capricious standard ensure the proper administration of benefit plans.

A fiduciary is obligated to act "solely in the interest of the participants and beneficiaries" (29 U.S.C. § 1104(a)(1)) and to comply with all of the other more specific fiduciary responsibility provisions of ERISA as well.[29] The fiduciary thus "is held to something stricter than the morals of the marketplace." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928) (Cardozo, C.J.); *see also Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 57 N.E.2d 638 (1944). When an employer is serving as the plan fiduciary, "the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest." *NLRB v. Amax Coal Co.*, 453 U.S. at 333; *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2219. Despite prodigious discovery in this case, plaintiffs uncovered no evidence that Firestone's denial of termination pay violated any of these fiduciary requirements.

Employees' benefits are also afforded substantial protection by judicial review of fiduciaries' decisions under the abuse of discretion standard. Most courts have recognized that the "arbitrary and capricious" standard is merely a shorthand way of describing a more detailed standard. The Ninth Circuit, for instance, has held that an ERISA fiduciary's decision should be reversed if it is "arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413, 418 (9th Cir. 1983); *see also Brown v. Retirement Committee of the Briggs & Stratton Retirement Plan*, 797 F.2d at 525; *Blakeman v. Mead Containers*, 779 F.2d at 1149-50.

29. Breach of these requirements may result in the personal liability or ouster of the fiduciary (29 U.S.C. § 1109(a)) and the assessment of a civil penalty (*id.* § 1132(i)). A fiduciary may also be held accountable for a co-fiduciary's breach of duty (*id.* § 1105(a)) and criminally liable for his own willful breach (*id.* § 1131).

Indeed, analysis of the standard applied under ERISA in hundreds of cases in the lower courts reveals that the standard closely resembles that articulated in the Administrative Procedure Act, 5 U.S.C. § 706(2). Under that statute, as under the abuse of discretion standard of ERISA, flexibility in response to particular problems has been the hallmark of the courts' approach. A standard of review under either statute, however formulated, is adequate if it "summon[s] forth what may best be described as an attitude of mind in the reviewing court—one that is 'searching and careful,' yet, in the last analysis, diffident and deferential." *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1049 (D.C. Cir. 1979) (citation omitted).

This flexibility has permitted courts applying the arbitrary and capricious standard under ERISA to take into account the existence of any actual or potential conflict of interest. *See, e.g., Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1152-53 (9th Cir. 1986); *Jung v. FMC Corp.*, 755 F.2d at 711-12. As sanctioned by these cases and by the common law of trusts, the district court in this case retained the deferential standard of review but conducted a more searching inquiry as a result of the potential conflict of interest. (A53)

The district court considered the terms of Firestone's termination pay plan (A51, A53; *see* JA119-JA121), the common understanding of the term "reduction in force" (A53), and case law under ERISA (A53-A54). The court also conducted a detailed analysis of Firestone's past interpretation of its RIF policies. (A55-A56; *see* JA120-JA123) In short, the analysis conducted by the district court was more than adequate to ensure that no consideration of self interest or other impropriety played a role in Firestone's decision to deny plaintiffs' claim for termination pay benefits.

As the Seventh Circuit has stated in rejecting the analysis of the Third Circuit in this case:

> Flexibly interpreted, the arbitrary and capricious standard, though infelicitously—perhaps even misleadingly—worded, allows the reviewing court to make the necessary adjustments for possible bias in the trustees' decision.

Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1053 (7th Cir. 1987). The Third Circuit's abstract concerns about conflicts of interest and standards of review were met in full by the district court's proper application of the arbitrary and capricious standard to the specific facts in this case. The decision of the district court should be reinstated and summary judgment should be entered for Firestone on plaintiffs' termination pay claim.

II. THE COURT OF APPEALS' HOLDING THAT A FORMER EMPLOYEE IS A "PARTICIPANT" IN AN ERISA PLAN MERELY BECAUSE HE CLAIMS A RIGHT TO BENEFITS UNDER THE PLAN CANNOT BE SQUARED WITH EITHER THE LANGUAGE OR THE LEGISLATIVE HISTORY OF THE STATUTE.

Many of ERISA's provisions regulate the administration of employee benefit plans with respect to "participants" and "beneficiaries"—the individuals who "are" or "may become eligible" to receive benefits under the plans. *See* sections 3(7) and 3(8) of ERISA, 29 U.S.C. § 1002(7) & (8). The statute contains rules regulating the types of information that must be disclosed to participants and beneficiaries (29 U.S.C. §§ 1024(b), 1025(a)), fiduciary standards requiring plan managers to perform their duties in the interest of participants and beneficiaries (*id.* §§ 1102-1112), and procedural provisions allowing participants and beneficiaries to enforce their other rights (*id.* § 1132(a), (c) & (g)).

Three former Firestone employees have claimed in this case that Firestone violated one of ERISA's disclosure provi-

sions, section 104(b)(4), 29 U.S.C. § 1024(b)(4) (set forth at A79-A80) by failing to respond properly to their requests for plan documents concerning Firestone's stock purchase and termination pay plans. The court of appeals reversed the district court's denial of discretionary damages to redress these alleged violations under section 502(c) of ERISA, 29 U.S.C. § 1132(c) (set forth at A82-A83). (A3) The basis for this reversal was the court's holding that plaintiffs are "participants" in the plans within the meaning of ERISA solely because they claim to be entitled to benefits—whether or not they actually have fulfilled or can in the future fulfill the eligibility requirements of the plans. (A42)

This self-selecting interpretation of who is a participant conflicts with that of every other circuit that has ruled on the issue.[30] The interpretation is also wholly at odds with the plain language of ERISA's definition of this term and with the legislative history of the term and of the disclosure provisions of ERISA and WPPDA. Moreover, contrary to the Third Circuit's belief, the interpretation is not required to ensure that claimants receive a judicial hearing on the merits of their claims.

A. The Court of Appeals' Interpretation of the Term "Participant" Is Plainly Incorrect Under the Statutory Language Defining That Term.

It is axiomatic that in determining the meaning of a statute, courts are to presume that its terms are "used in their

30. The Fifth Circuit has held that a former employee is a participant in a plan only if his benefits have vested. *Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir. 1980); *see Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 228 (5th Cir. 1981) (holding the phrase "may become eligible" in ERISA's definition of the term "participant" to apply only to current employees). The Ninth Circuit has rejected this approach and has held that a former employee is a participant if he has either "a reasonable expectation of returning to covered employment" or a "colorable claim to vested benefits." *See Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, 107 S. Ct. 318 (1986); *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 303 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984). The Second Circuit, whose precedent on this issue was not mentioned by the court of appeals (*see* A40-A41), follows the same approach as the Ninth. *See Saladino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

ordinary and usual sense, and with the meaning commonly attributed to them." *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917); *see Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 129 n.24 (1971). This principle requires reversal of the court of appeals' holding because Congress' words in ERISA clearly do not contemplate the term "participant" to include employees or former employees "who claim to be entitled [to a benefit] but in fact are not" (*see* A42)[31] or "whose claim is not colorable" (*see* A43).

Section 3(7) of ERISA defines a participant to include "any employee or former employee . . . who is or may become eligible to receive a benefit." 29 U.S.C. § 1002(7). As used in the definition of participant, the word "eligible" refers to the criteria established by the plan that an employee or former employee must fulfill as prerequisites for the payment of benefits. Some of these criteria are related to the length of the employee's service or former service with his employer; others describe events upon which benefits will be provided.[32] The employee or former employee "is . . . eligible" to receive a benefit if he has fulfilled all of these criteria.

The question that has divided the courts of appeals is the meaning that should be given to the phrase "may become eligible." The Third Circuit's interpretation makes all people who may prevail in court on a benefit claim, or *all* employees and *all* former employees, into participants. (A43)[33] This obviously is not what the statutory language says. In fact, "may become eligible" refers not to the possibility that a claimant may prevail in his suit for benefits but rather to an employee or former employee's ability to fulfill the plan's eligibility criteria at some time in the future. It is to include both present and future recipients of benefits that the statute uses both the present tense "is" and the subjunctive future tense "may become" in defining who is a participant.

In stark contrast to the court of appeals, the district court in this case interpreted the term "participant" in accordance with the grammatical structure and the common understanding of the language used in the statutory definition and held that these plaintiffs did not satisfy that definition. Construing the term "is eligible," the district court correctly concluded that Schade and Smolinski were no longer participants in Firestone's termination pay plan following the sale of the Plastics Division "because the sale of the plants as ongoing operations did not constitute a reduction in force" and therefore they were not "presently eligible" to receive RIF termination pay. (A71) Construing the term "may become eligible," the district court correctly concluded that these two former employees "were no longer associated with Firestone" and thus "would not become eligible in the future for termination pay because Firestone provides termination benefits only to its own employees." (A71) *See* 29 C.F.R. § 2510.3-3(d)(2)(i) (Department of Labor regulation relating cessation of participant status to the time when an individual becomes "ineligible to receive any benefit under [a welfare] plan even if the

31. The court of appeals held elsewhere in its opinion as a matter of law that plaintiffs were not entitled to benefits under the very stock purchase plan concerning which they had sought documents. (*See* A31, A32, A39)

32. The definition of "employee welfare benefit plan" contained in ERISA itself refers to numerous criteria of this second type (*e.g.*, benefits "in the event of sickness, accident, disability, death or unemployment") and excepts certain such criteria (*e.g.*, pension "on retirement or death"). *See* 29 U.S.C. § 1002(1); *see also* section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).

33. The Third Circuit's holding takes even further the position of the Second and Ninth Circuits that a former employee "may become eligible to receive a benefit" if he has a "colorable claim" to benefits. *See Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d at 303; *Saladino v. ILGWU National Retirement Fund*, 754 F.2d at 476. All three of these courts misinterpret the phrase "may become eligible" by assuming that when a court decides that a claimant is entitled to benefits, the claimant has "become" eligible. To the contrary, what the court decides is that the claimant "is" and always has been eligible to receive benefits. It is fulfilling the eligibility criteria that makes him a participant—not making a claim or even a "colorable" claim.

contingency for which such benefit is provided should occur").[34]

The district court was also correct in concluding that Bruch ceased to be a participant in Firestone's stock purchase plan at the time of the sale because "[h]e received distribution of his vested interest and his unvested interests were forfeited." (A72) He was not then eligible because he had been paid all of the benefits due him and he could not become eligible because the plan only covered Firestone employees. These rulings should have been affirmed based on the statutory language alone.

B. The Legislative History of ERISA and WPPDA Demonstrates the Congressional Intent That the Term "Participant" Be Given a Narrower and Less Burdensome Interpretation Than That Adopted by the Court of Appeals.

The legislative history of ERISA contains little discussion of what Congress meant by the statutory definition of the term "participant" or by section 502(c), probably because extremely similar provisions were already contained in WPPDA, the predecessor statute to ERISA governing disclosures by employee benefit plans.[35] Congress did not broaden the scope of the term "participant" or the private enforcement mechanism

34. *See also* 29 C.F.R. § 2510.3-3(d)(3) (DOL regulation requiring an unvested participant in a pension plan who incurs a one year break in service to complete another year of service with the employer in order to regain participant status); *id.* § 2610.2(a)(2) (PBGC regulation only recognizing as participants for the purpose of determining employer premium liability those individuals "not currently in employment" who are "earning or retaining credited service under the plan"). These intricate regulations defining which former employees are participants under ERISA would be unnecessary if the court of appeals were correct that all former employee claimants are participants.

35. Section 3(a)(6) of WPPDA, which defined the term "participant," was identical in relevant part to ERISA's definition. *Compare* 29 U.S.C. § 302(a)(6) (1958), *repealed by* 29 U.S.C. § 1031(a)(1), *with* 29 U.S.C. § 1002(7). The language of the definition was not an issue in the legislative development of WPPDA. *Compare* H.R. 13507, 85th Cong., 2d Sess.

with respect to a plan's disclosure obligations when it enacted ERISA; instead, it strengthened WPPDA's protection of employee benefits in other ways.[36] Because the definition of "participant" and the enforcement provision were left intact, the legislative history of these provisions in WPPDA is illuminating with respect to ERISA as well.

Three features of the legislative history of ERISA and WPPDA confirm that the court of appeals' interpretation of the term "participant" is incorrect. First, Congress intended participant status to be conferred only when an employee or former employee has already fulfilled the plan's eligibility criteria or when he remains able to do so in the future. Second, Congress considered the private enforcement provi-

§ 3(a)(6), 104 Cong. Rec. 16,435, 16,436 (1958) *with* S. 2888, 85th Cong., 1st Sess. § 3(a)(6), 103 Cong. Rec. 16,570 (1957).

The provision in WPPDA that permitted an individual participant to enforce the disclosure provisions of the statute was very similar to section 502(c) of ERISA, except that the damages under WPPDA were limited to $50 a day as opposed to the $100 limit in ERISA. Section 9(b) of WPPDA provided:

> Any administrator of a plan who fails or refuses, upon the written request of a participant or beneficiary covered by such plan, to make publication to him within 30 days of such request, in accordance with the provisions of section 8, of a description of the plan or an annual report containing the information required by sections 6 and 7, may in the court's discretion become liable to any such participant or beneficiary making such request in the amount of $50 a day from the date of such failure or refusal.

29 U.S.C. § 308(b) (1958), *repealed by* 29 U.S.C. § 1031(a)(1); *compare* 29 U.S.C. § 1132(c), set forth at A82-A83.

36. The major reports on ERISA state that Congress was impelled to amend WPPDA because the earlier statute was "weak in its limited disclosure requirements" and "wholly lacking in substantive fiduciary standards." H.R. Rep. No. 533, 93d Cong., 1st Sess. 4, 10-11 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4642, *and in* 2 *Legislative History* 2348, 2351; S. Rep. No. 127, 93d Cong., 1st Sess. 4, 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4841, 4863, *and in* 1 *Legislative History* 587, 590, 613; *see also* Dep't of Labor, "Explanatory Statement of Amendments to the Welfare and Pension Plans Disclosure Act Made by the Employee Benefits Protection Act," *reprinted in* 119 Cong. Rec. 12,075, 12,076 (1973), *and in* 1 *Legislative History* 274, 278.

sion in WPPDA to be ineffective but sought to strengthen it by creating government enforcement mechanisms—not by expanding the scope of the damages provision itself as the court of appeals has done. Third, Congress was concerned in both WPPDA and ERISA not to overburden plans with excessive and expensive disclosure requirements such as those created by the court of appeals' holding.

1. The legislative history contains numerous examples of the congressional understanding that the phrase "may become eligible" refers to the ability of an employee or former employee to fulfill the plan's eligibility criteria in the future. For example, in discussing the need for federal disclosure legislation governing private benefit plans in 1958, the Senate Committee on Labor and Public Welfare noted the "basic fact" that:

> The employees covered by these group plans have no specific rights *until* they meet the conditions of the particular plans. For example, in the case of a pension plan this might involve 30 years' service and the attainment of age 65; in a welfare plan the employee's right could mature in the event of accident, sickness, death, etc.[37]

Similarly, the 1974 report of the House Committee on Ways and Means noted the importance of providing information to participants regarding their vested rights to retirement benefits so that the participants "will not neglect to claim these benefits *when* they become eligible to receive them." H.R. Rep. No. 779, 93d Cong., 2d Sess. 30 (1974), *reprinted in* 2 *Legislative History* 2590, 2619 (emphasis added). These comments also clearly indicate that Congress did not consider that an employee or former employee "is" eligible to receive a

37. S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4137, 4140 (emphasis added); *accord* 104 Cong. Rec. 7050 (1958) (statement of Sen. Kennedy); *see also* H.R. Rep. No. 2283, 85th Cong., 2d Sess. 8 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4181, 4187-88 (describing certain types of employee benefit plans covered by the act as providing benefits for particular contingencies, *i.e.*, "in the event of untimely death, permanent and total disability, and old age" and "during periods of temporary illness or disability").

benefit until he has fulfilled all of the eligibility criteria established by the plan.

2. While Congress recognized the weakness of the damages provision in WPPDA that was the precursor of section 502(c) of ERISA, it resolved this problem by adding other enforcement mechanisms—not by broadening the scope of the provision itself, as did the court of appeals. Representative Edith Green criticized section 9(b) of WPPDA as "an illusory penalty" that "sounds much better than it really is." "Supplemental Views" in H.R. Rep. No. 2283, 85th Cong., 2d Sess. 26 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4181, 4204-05.[38] Her remarks were recited in 1961 in support of an amendment that gave the Secretary of Labor the authority to enforce the statute. 107 Cong. Rec. 18,266 (1961) (statement of Rep. Corman quoting Rep. Green, 104 Cong. Rec. 16,442 (1958)).

The amendment was "designed to provide the enforcement teeth which [we]re lacking in the existing law."[39] Congress did *not* provide those teeth by changing the damages provision or expanding the interpretation of who is a participant. The court of appeals' holding is thus at odds with congressional intent.[40]

38. Representative Green explained that "[t]he employee who asks his employer for a copy of the plan or of the annual report can be fired, thereby losing his right to sue." *Id.* In reiterating her criticism during the floor debate on H.R. 13507, she added that if the employee takes the matter to court he must "advance the costs of the litigation—if he has the money to advance—in the hopes of winning the lawsuit and getting attorneys' fees and costs." 104 Cong. Rec. 16,442 (1958). WPPDA, unlike ERISA, did not prohibit employers from retaliating against employees who exercised their rights under the statute. *See* 29 U.S.C. § 1140.

39. H.R. Rep. No. 998, 87th Cong., 1st Sess. 5 (1961), *reprinted in* 1962 U.S. Code Cong. & Admin. News 1532, 1537; *see also* S. Rep. No. 908, 87th Cong., 1st Sess. 3 (1961) (both bills to amend WPPDA "follow the same general outline and pattern of S. 2888 which the Senate passed unanimously in 1958").

40. The inconsistency between the court of appeals' holding and Congress' intent is further demonstrated by their differing views of when discretionary damages should be awarded under section 502(c) of ERISA. The

3. Congress was concerned in enacting WPPDA "to place the least possible burden" upon benefit plans.[41] The Congress that enacted ERISA was equally concerned not to burden plans so heavily by regulation that "employers respond . . . by decreasing benefits under existing plans or slowing the rate of formation of new plans."[42] The court of appeals' broad definition of the term "participant" contravenes these expressions of congressional intent and would turn plan administrators' disclosure requirements into an administrative nightmare.

The court of appeals concedes that "it is expensive and inefficient" (A43) to send numerous plan documents at various times to every employee and former employee of the company who might someday make a claim for benefits—*i.e.*, every employee and former employee—and to respond within

House Committee on Education and Labor that wrote the precursor to this provision in 1958 intended damages to be awarded sparingly:

> It is the intention of the committee that no fine or penalty provided for under this act, whether civil or criminal, shall be imposed except for deliberate defiance or persistent refusal in bad faith to comply with a clear obligation imposed by the provisions of this act.

H.R. Rep. No. 2283, 85th Cong., 2d Sess. 11 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4181, 4190; *see also* 104 Cong. Rec. 16,433 (1958) (statement of Rep. Barden). In contrast, the court of appeals suggested that it would be appropriate to award damages even when there is no bad faith. (*See* A43) The court of appeals should rather have followed the approach of the district court, which declined to award damages in this case partly because "plaintiffs have not presented any evidence to show that they have sustained harm" from the alleged inadequacies in Firestone's disclosures to them. (A72)

41. S. Rep. No. 1440, 85th Cong., 2d Sess. 25 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4137, 4160; *see also* H.R. Rep. No. 2283, 85th Cong., 2d Sess. 11 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 4181, 4190.

42. H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4682, *and in* 2 *Legislative History* 3115, 3135; *see also* H.R. Rep. No. 779, 93d Cong., 2d Sess. 14 (1974), *reprinted in* 2 *Legislative History* 2584, 2603-04 ("the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted . . ."); *see generally* p. 14 n.12.

30 days to every written request for plan information from such an employee or former employee.[43] The court fails, however, to appreciate how these requirements disrupt the balance struck by Congress. Even if it were possible to locate all former employees, the cost of complying with these onerous disclosure obligations, especially for large plans, would certainly "reduce the amounts available to actual beneficiaries of the plan for no statutory purpose." *Saladino v. ILGWU National Retirement Fund*, 754 F.2d at 476.

The court of appeals believed that its holding served the statutory purpose of arming "individual participants and beneficiaries . . . with enough information to enforce their own rights." S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863, *and in* 1 *Legislative History* 587 (quoted at A43). This argument begs the question, however, because the quoted passage from the legislative history speaks of "participants" who have "rights" and not of "claimants."

In any event, a more limited interpretation of the term "participant" does not defeat this statutory purpose. It merely avoids pointless expenditures. Plan administrators will generally comply with requests for information—as Firestone did here (*see* A71)—because of the constraints in ERISA[44] and also because it makes good sense from an employee relations standpoint to do so. If the employee submits a claim for benefits to the plan, he must be given information about his rights at that time under section 503(1), 29 U.S.C. § 1133(1).

43. Under section 104(b) of ERISA, a participant must be sent copies of plan documents at specified times and intervals (29 U.S.C. § 1024(b)(1)); may examine such documents at any time at specified places (*id.* § 1024(b)(2)); must be sent financial information annually (*id.* § 1024(b)(3)); must be sent copies of plan documents on request (*id.* § 1024(b)(4)); and must be sent information as to his accrued and nonforfeitable benefits on request once a year (*id.* § 1025(a)).

44. As fiduciaries under ERISA (*see* 29 U.S.C. § 1002(16)(A) & (21)(A)), administrators are subject to numerous fiduciary responsibility provisions (*see id.* §§ 1102-1112) and to the risk of being found to have violated the disclosure provisions of the statute if the requester does in fact turn out to have been a participant in the plan (*see id.* § 1132(a) & (e)).

He may also obtain a far broader range of information in the course of any ensuing litigation.[45] The limited document disclosure available under section 104(b)(4) was not designed nor is likely to serve as an effective discovery tool to prospective litigants.[46]

C. The Court of Appeals' Interpretation of the Term "Participant" Is Not Required To Ensure That Benefits Claimants Are Able To Obtain Judicial Hearings on the Merits of Their Claims.

The court of appeals' holding that the term "participant" must be construed to include any employee or former employee who claims a right to benefits was based primarily on its concern that such individuals have standing to sue under section 502(a)(1) of ERISA, 29 U.S.C. § 1132(a)(1). The court reasoned that the term had to be given the same interpretation throughout ERISA and that a broad interpretation was

45. Additionally, an employee or former employee who claims an entitlement to benefits (or anyone else, for that matter) may obtain plan documents from the Secretary of Labor. Section 104(a)(1) of ERISA, 29 U.S.C. § 1024(a)(1), requires an administrator to file with the Secretary or to furnish upon his request all of the plan documents described in section 104(b)(4). The most significant of these documents are to be made "available for inspection in the public document room of the Department of Labor," and the other documents presumably also are available through the Freedom of Information Act, 5 U.S.C. § 552.

46. The disclosure provisions of ERISA were designed to fulfill the perceived

> need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted.

H.R. Rep. No. 533, 93d Cong., 1st Sess. 10-11 (1973), *reprinted in* 1974 U.S. Code & Admin. News 4639, 4648-49, *and in* 2 *Legislative History* 2348, 2357-58; S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863, *and in* 1 *Legislative History* 587, 613.

required because otherwise a court might find that an individual is not a participant or beneficiary and dismiss his claim for lack of standing before reaching the merits. (*See* A41) This fear is baseless because the issue of a plaintiff's standing to sue is addressed repeatedly throughout the litigation of his claim—as it was in this case until plaintiffs ultimately lost on the merits.

A complaint alleging that the plaintiff is a participant or beneficiary in an ERISA plan and alleging facts that, if true, support this conclusion will survive a motion to dismiss for lack of standing. This has nothing to do with the term "participant" being given a broad interpretation. It rather follows from the established principle that well-pleaded allegations will be taken as true against a motion to dismiss the complaint. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975); *Saladino v. ILGWU National Retirement Fund*, 754 F.2d at 477 (even if the defendant plan asserts that the plaintiff is not a participant, "the courts are obviously free to re-examine a litigant's status under a plan").

Down the road in the litigation, a motion for summary judgment alleging that the plaintiff is not a participant or beneficiary will be denied if there is a genuine issue of material fact concerning his status. Fed. R. Civ. P. 56(c). In this case, there was no such issue (*see* A56, A66, A71-72) and the district court therefore granted summary judgment in favor of Firestone on the merits of the section 502(c) claims (A72). In some cases, the standing issue may not be finally resolved until even later. As this Court recognized in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 115 n.31:

> Although standing is generally a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence addressed at trial.

The issue of the plaintiff's standing is treated the same as any other basic element of a claim for relief in this respect. At each stage, the plaintiff's allegations are tested more stringently until they are either proven or repudiated.

Cases brought under ERISA will often entail reexamination of the standing question because the statute confers standing to sue only upon those individuals who have substantive rights. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21, 25 (1983). Section 104(b)(4), 29 U.S.C. § 1024(b)(4), requires an administrator to provide plan documents upon the written request of "any participant or beneficiary"; section 502(c), *id.* § 1132(c), provides for the payment of discretionary damages to such "participant or beneficiary" when the administrator fails or refuses to comply with the request within 30 days; and section 502(a)(1), *id.* § 1132(a)(1), provides the "participant or beneficiary" with standing to sue for damages under section 502(c) (*id.* § 1132(a)(1)(A)) or for benefits due him under the plan (*id.* § 1132(a)(1)(B)).

A plan administrator who contends that the document request he received was not from a "participant" may be understood to be saying first, that the individual in question does not have standing under section 502(a)(1) and second, that the individual is not entitled to damages under section 502(c) because he was not entitled to the information requested under section 104(b)(4). In such a case, standing and the merits present the same issue. A plaintiff pressing a section 502(c) claim who is found at any stage not to be a "participant" has thus lost on the merits because this finding means that he was never entitled to information under section 104(b)(4). As the court of appeals itself recognized, the court correctly decides the case on the merits in this situation; it does not dismiss for lack of jurisdiction. (A41)[47] *See American Civil Liberties Union v. City of St. Charles*, 794 F.2d

47. The court analogized the situation under ERISA to that under the Clayton Act, where the statute is "underst[oo]d" to "confer jurisdiction on

265, 269 (7th Cir.), *cert. denied*, 107 S. Ct. 458 (1986) (plaintiff who fails to prove injury loses on merits because dismissal on jurisdictional grounds might allow a new suit to be brought). That is exactly what happened here.

In short, there is no cause for concern that plaintiffs will be denied hearings on the merits of their claims because they arguably are not participants within the meaning of ERISA. Certainly the concern does not justify contravention of the statutory definition of this term and the policies underlying the congressional adoption of that definition.

the federal courts to hear *claims* that a violation has occurred (or will occur)." (A42 n.19) (emphasis in original). The court elaborated:

> If at the end of trial the court finds that there was no violation, so that the defendant wins, the victory is on the merits. We do not hold that, because there was no violation of the relevant antitrust provision, the court lacked subject matter jurisdiction.

(*Id.*)

CONCLUSION

The court of appeals' decision on each of the questions presented is flatly inconsistent with statutory intent as reflected by the language and the legislative history of ERISA. The decision has impact far beyond the present case and should not be permitted to stand. Accordingly, we request that the judgment be reversed and the case remanded with instructions to reinstate the decision of the district court on the two issues remaining in this case.

Respectfully submitted,

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June 9, 1988.

QUESTIONS PRESENTED

1. Whether under the federal common law that governs employee benefit plans, questions of interpretation concerning plan instruments are for the courts or for plan administrators to decide in cases in which it is the administrator's self-interest to construe the plan against the putative participants and in which the plan itself does not vest the administrator with the power to authoritatively determine the meaning of the plan?

2. Whether an employee or former employee who asserts a claim for benefits under an employee benefit plan is entitled, upon request, to receive a copy of the document which sets forth the terms of the plan?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1054

THE FIRESTONE TIRE & RUBBER CO., *et al.*,
Petitioners,

v.

RICHARD BRUCH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS

The citation to the opinions below and the basis for this Court's jurisdiction are correctly set forth in petitioner's brief at pp. 1-2. Certain of the statutory provisions involved in this case are reprinted in the Appendix to the Petition for a Writ of Certiorari at pp. A77-A85. In addiiton, §§ 101(a), 409, 502(a), (c) and 503 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1021(a), 1109, 1132(a), (c), 1133, are pertinent here; those sections are reprinted as an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

Until 1980, respondents and the more than 500 class members they represent (collectively referred to as "plaintiffs") were salaried employees of the Plastics Division of petitioner Firestone Tire & Rubber Co. ("Firestone" or "the Company"). In November, 1980, Firestone sold that Division to Occidental Petroleum Corporation ("Occidental"). Plaintiffs were terminated as employees of Firestone and were hired as employees of Occidental. Pet. App. A4.[1]

As a result of having been terminated by Firestone, plaintiffs ceased accruing service under Firestone's Retirement Plan for Salaried Employees; thus plaintiffs' Firestone pension rights were frozen at their then-current levels and plaintiffs lost the opportunity to take early retirement upon reaching age 55 or upon completing ten years of service. *See* Pet. App. A33-A36.[2] Similarly, because they were terminated, plaintiffs ceased accruing service under Firestone's Stock Purchase and Savings Plan and forfeited any unvested stock. *See* Pet. App. A4-A5, A63. And plaintiffs were placed under Occidental's health insurance plans which provided a lower level of benefits than Firestone's plan.[3]

At the time plaintiffs were terminated, Firestone maintained a severance pay plan for its salaried employees. Those employees were notified of the existence of that plan by virtue of the "Handbook for Firestone's Salaried Employees" which was given to each salaried employee, and which under the heading "Your Benefits" included the following section:

> *Termination Pay*
>
> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your jobs.
>
> The amount of termination pay you will receive will depend on your period of credited company service. [Pet. App. A48]

The terms of Firestone's severance plan were set forth in Firestone's Salaried Personnel Manual, a confidential document distributed only to personnel managers and senior management executives, J.A. 121, and the existence of which was unknown to at least some of the plaintiffs.[4]

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[1] The record indicates that there was an "understanding[]" between Firestone and Occidental—one that was "not expressly memorialized" in their contract—that Occidental would hire all of Firestone's employees; indeed Occidental viewed it as in its self-interest to do so and Occidental "was concerned that everything possible be done to prevent employees from resigning." Affidavit of Richard Jöhnson, October 24, 1985, ¶¶ 2, 3.

Occidental did not *retain* all of Firestone's salaried employees, however; beginning in 1982 Occidental shut down two of the five plants it had purchased from Firestone and reduced forces at other plants. *See* Deposition of James Reder, August 27, 1984, at 76-82.

[2] Under the Firestone pension plan, only one who was actively employed by Firestone immediately prior to retiring could elect early retirement; once terminated, therefore, plaintiffs lost the opportunity to take early retirement as well as the opportunity to earn higher pension benefits by accruing additional service and by obtaining salary increases.

Plaintiffs did, of course, begin to accrue service under Occidental's plan (at least for so long as plaintiffs remained employed by Occidental, *see* n.1 *supra*), but plaintiffs were required to satisfy new vesting requirements and had no assurance that their net pensions upon retirement would equal the pensions plaintiffs would have received had they remained employed by Firestone.

[3] *See* Affidavit of Richard Bruch, ¶ 15; Second Affidavit of Richard, ¶ 5.

[4] *See* Affidavit of Richard Bruch, ¶ 6. Although the Manual was deemed confidential by Firestone, an employee who was aware of the Manual's existence and who requested to see a specific policy

The Manual defines the operative phrase "reduction in work force" as the "Termination of employment by the Company, without prejudice to the employee." (§ 1.54) The Manual goes on to define the other types of termination of employment ("resignation," "separation," "discharge," "retirement," and "death") (§ 1.54); to require that "[a]ll terminating employees must have an exit interview to establish the true cause of termination" (§ 1.51); and to state the amount of severance pay—two weeks' pay per year of service—for employees "terminated under the Reduction-in-Force policy." (§ 2.11.3(C)).[5]

At the time of the events in question, Firestone had not appointed any "board, committee or trustees to ad-

in the Manual could go to the personnel office at the employee's plant and review the policy in question with a personnel representative. J.A. 121.

[5] The pertinent provisions of the Manual appear at pp. 263-79 of the joint appendix that was filed in the court of appeals.

After Firestone had reached the agreement with Occidental to sell the Chemical Division but before the sale became effective, Firestone amended its Manual by adding the following two prefatory paragraphs to the section on severance pay (§ 211.3):

> Despite the objectives of Firestone to provide stable employment, continued earnings and benefit coverage to its employees, there may be economic conditions that develop which make it necessary for the company to temporarily or permanently terminate the employment of some of its work force.
>
> In the event such releases must be made, the following reduction in force policies have been estabiished with the goal of minimizing the economic and mental stress of terminated employees during the period of time between release from Firestone and securing their employment (or reemployment by Firestone).

In the courts below, Firestone cited to these additions to the Manual to support its decision to refuse severance pay to plaintiffs; the district court declined to rely on these additions because they were adopted only one month before the sale was consummated. *See* Pet. App. A69.

minister the severance pay plan"; instead, according to Thomas Robinson, Firestone's Director of Compensation and Management Development, the plan was administer d by "personnel managers in our various locations, using policy as a general guideline" and where severance pay was awarded, the payment was made out of Firestone's general treasury, rather than out of a trust or other segregated fund.[6] Moreover, as Robinson also testified, as of the time of the sale Firestone was "unaware" that its "termination pay policy" was regulated by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq ("ERISA"). J.A. 125.

Lacking any administrator or other structure for its severance pay plan, upon consummating the sale to Occidental Firestone decided, through its corporate officers, not to assume the substantial cost—in excess of six million dollars—of paying severance pay to its over 500 salaried employees.[7] Instead, Firestone concluded that the termination of its employees did not constitute a "reduction in force" as that phrase is defined in the Manual, *viz.*, a "termination without prejudice to the employee."

Two of the named plaintiffs wrote to Firestone concerning the denial of termination pay. By letter dated March 7, 1981, plaintiff Leonard Smolinski "ma[de] application for my severance pay which is due me" and stat[ed] that if "my request is denied, I would like a

[6] Deposition of Thomas Robinson, May 2, 1983, at 90-91; *see id.* at 153-54.

[7] The record contains an internal Firestone memorandum obtained through discovery (and reprinted at p. 220 of the joint appendix in the court of appeals) stating that if severance pay were awarded at the rate of one month pay per five years of service, the cost to Firestone would be $3,100,000. Paying severance pay at the rate of two weeks per year of service as provided for in the Manual would more than double that cost.

written statement vertifying this fact"; Smolinski did not receive any response to this request.[8] Similarly, on May 4, 1981, plaintiff Albert Schade wrote to Firestone requesting "our outline and/or contract on company severance" and "the provision of severance from the company"; Firestone responded to Schade's letter by stating its conclusion that because Schade was rehired by Occidental the "termination provisions do not apply," but Firestone did not provide Schade with the documents he had requested.[9]

Prior Proceedings

On July 29, 1982, plaintiffs commenced this action under § 502 of ERISA, 29 U.S.C. § 1132, challenging, *inter alia*, Firestone's refusal to pay severance pay to its terminated salaried employees and Firestone's failure to provide requested documents to the named plaintiffs who made such requests.[10] On cross-motions for summary judgment the district court ruled for Firestone on all counts and dismissed the complaint. The district court "conclude[d] that Firestone's decision not to pay plaintiffs and the employees they represent termination

[8] *Id. Deposition of Leonard Smolinski*, April 22, 1983, at 30 & Exs. 90-92. Smolinski also requested information on retirement benefits and he received four letters in response to that request, none of which addressed Smolinski's request for a "written statement" with respect to this entitlement to severance pay.

[9] Deposition of Albert Schade, April 21, 1983, at 50 & Exs. 31, 31-A. In addition to the information requests described in text, plaintiff Richard Bruch, who as a result of being terminated forfeited 200 shares of unvested stock in Firestone's Stock Ownership Plan, *see* Second Affidavit of Richard Bruch ¶ 5, wrote to Firestone on May 4, 1981 and again on May 26, 1981 requesting a copy of the "complete plan"; Firestone did not respond to either of Bruch's letters. Deposition of Richard Bruch, February 23, 1983, at 66 & Dep. Ex. 29.

[10] Plaintiffs also challenged decisions Firestone had made, upon terminating plaintiffs' employment, with respect to plaintiff's entitlements' under the pension plan, the stock plan, and Firestone's vacation plan. Those counts were either withdrawn or dismissed and are no longer involved in this case.

pay benefits was not arbitrary and capricious and defendants are entitled to summary judgment on this count." Pet. App. A56. And having decided that plaintiffs were not entitled to severance pay as of the time of the sale, the district court concluded that plaintiffs were therefore not at that time "participants or beneficiaries" of Firestone's severance pay plan and were not entitled to information under § 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4). *See* Pet. App. A70-A72.

Plaintiffs appealed and the court of appeals (per Becker, J.) reversed the district court's judgment on the two issued noted above. Concluding that "the decision by Firestone to deny benefits under the termination pay plan should be reviewed de novo by the [district] court," the Third Circuit remanded the severance-pay claim "so that the district court can decide the proper construction of the relevant plan language." Pet. App. A3. And concluding that the disclosure requirement contained in ERISA § 104(b)(4) "would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not" the court of appeals remanded the information claim to enable the district court to "exercise [its] discretion" in "determin[ing] how much the claimant should receive in damages." Pet. App. A42, A3-A4.

On April 4, 1988, this Court granted Firestone's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. The principal issue addressed by Firestone concerns the scope of review under ERISA of decisions made by one acting as a fiduciary to deny benefits under an employee benefit plan. But that question is not squarely raised by this case. In the courts below Firestone conceded that in deciding to deny severance pay to plaintiffs, Firestone "was unaware that ERISA applied to termination pay," and that Firestone did not pur-

port to make its decision as a fiduciary; rather, Firestone acted *as an employer*, taking into account its own financial interests. There is, therefore, no room for Firestone to claim whatever shield of deference the law provides to those acting as a fiduciary to defend a decision the Company admittedly made *qua* employer. Accordingly, this Court may wish to dismiss the writ of certiorari as improvidently granted. Pp. 12-15.

II. If Firestone had acted as a fiduciary, the Court would confront the question of whether under ERISA the courts are to defer as a matter of course to benefit decisions of the type involved here.

A. Prior to the enactment of ERISA, there would have been no basis for such deference. Pre-ERISA, a suit like this would *not* have implicated the law of trusts for the simple reason that, in adopting its severance pay plan, Firestone did not choose to create a trust; rather, Firestone's severance pay plan was unfunded. And under pre-ERISA law it was well-established that a suit seeking redress for an employer's denial of unfunded welfare benefits sounded in contract. In such cases—as in contract suits generally—the courts interpreted the contract to determine whether an employer's refusal to pay constituted a breach of contract. In arguing for deferential review here, Firestone is thus reduced to claiming that ERISA worked a substantial *diminution* of the preexisting, contractual rights of employees under unfunded welfare plans. Pp. 16-19 *infra*.

B. In enacting ERISA "Congress intended benefits decisions to be committed to the authority of fiduciaries who would be subject to standards that had been developed in the common law of trusts," as Firestone correctly states. But under ERISA, plan administrators also have duties imposed by "the terms of [a] plan," and ERISA § 502(a)(1)(B) creates a discrete cause of action to enforce these latter duties. Such actions—of which the instant case is one—are to be resolved

under a "federal common law of rights and obligations under ERISA-regulated plans," *Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 55 L.W. 4471, 4475 (April 6, 1987), fashioned out of the policies of ERISA and drawing upon state law to the extent such law helps effectuate those policies. The task here, then, is to define, the federal common law rule with respect to the appropriate scope of judicial review of claims of the type plaintiffs here assert. Pp. 19-24 *infra*.

C. (1) Plaintiffs here are not challenging the exercise of any authority which is inherently discretionary in nature. Firestone's severance pay plan did not leave decisions as to severance pay eligibility to the judgment of the plan administrator; rather the plan requires that severance pay be provided to every employee terminated due to a "reduction in force" and to no others. In deciding whether to award severance benefits Firestone's task, as plan administrator, was to reach a decision as to whether the term "reduction-in-force" as used in the plan encompasses terminations resulting from the sale of a plant as an ongoing business. That is as pure a question of plan interpretation as can be imagined.

Nothing in the plan instrument purports to commit such a decision to the discretion of the plan administrator or to render the administrator's interpretation of the plan conclusive. Moreover, in interpreting the plan, Firestone faced a conflict of interest to a degree unknown to the law of trusts: because the severance pay plan is unfunded, any benefits that Firestone, as administrator, concluded were owed under the plan would be paid directly out of its pocket, as employer, rather than out of any trust fund. Thus, the question posed here is whether under the federal common law of employee benefit plans, the federal courts are required to defer to the interpretation of plan instruments adopted by a self-interested employer/plan administrator where the plan instruments themselves do not purport to vest the ad-

ministrator with the power to authoritatively determine the meaning of those documents. Pp. 24-27 *infra*.

(2) Nothing in ERISA's bare words conclusively answers that question nor is there anything in the legislative history directly on point. But the policies underlying ERISA require the courts to formulate federal common-law rules which will "promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1985), and "protect contractually defined benefits," *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). And these policies do not permit a rule which would empower the self-interested employer/administrator to determine the proper meaning of the plan instrument where that authority is not conferred on the administrator by the instrument. Rather, at least in such cases, questions of plan interpretation should be resolved, as a matter of federal common law, by the courts. Pp. 27-30 *infra*.

(3) Contrary to Firestone's suggestions, the law of trusts does not support a contrary conclusion; rather, that law compels the same conclusion as the one derived from ERISA's policies. The law of trusts does defer to a trustee's exercise of discretionary authority, but trust law empowers the courts to direct trustees to perform mandatory functions. And trust law does not treat the power to interpret a trust instrument as a discretionary function of the trustee; rather, like contract law, trust law assumes that it is ordinarily for the courts to determine the meaning of legal documents, including trust instruments, unless something in the trust instrument itself provides for a different division of authority. Thus, pre-ERISA, where trusts were created to provide employee benefits, the courts would defer to the trustees' interpretation of the trust documents if the documents themselves so provided, but otherwise the courts proceeded on the premise that it was a judicial responsibility to determine the meaning of the trust instrument. Pp. 30-35 *infra*.

III. Plaintiffs' complaint also sought damages for the three individual plaintiffs whose requests for copies of Firestone's severance pay and stock plans were ignored by the Company. Firestone's defense—that at the time of these requests the plaintiffs were no longer "participants" in the plans and hence were not entitled to information about the plans—is without merit.

A. ERISA contains two types of disclosure provisions: those requiring disclosure automatically and without request and those requiring disclosure in response to specific information requests. The former provisions run only to "participant[s] covered under the plan"; the Department of Labor has authoritatively construed that phrase to be a term of art and has defined it in a complex set of regulations. The latter provisions—requiring disclosure only on request—run to "any participant," a broader class which, in the Labor Department's view encompasses "many individuals whose interest in an employee benefit plan is minimal." 40 Fed. Reg. 24,642. It is the scope of that broader class that is at issue here. Pp. 36-39 *infra*.

B. ERISA defines "participant" to mean "any employee or former employee . . . who is or may become eligible to receive a benefit. . ." This definition is sufficiently broad to encompass former employees who claim to be entitled to benefits and thus "may become eligible" based on a subsequent determination of their entitlement. And Congress' intent to use the term in this way is clear both from the other contexts in the Act in which the term "participant" is used—most significantly, the section of the Act requiring benefit plans to establish a claims procedure for "*any participant* whose claims for benefits has been denied"—and also by the legislative history of the disclosure provisions which show that those provisions were intended to enable employees and former employees to obtain the information needed to determine whether they have valid claims under a plan. Pp. 39-46 *infra*.

ARGUMENT

I. BECAUSE FIRESTONE DID NOT PURPORT TO ACT AS A FIDUCIARY IN DENYING SEVERANCE PAY TO PLAINTIFFS, THIS CASE DOES NOT SQUARELY RAISE ANY QUESTION AS TO THE SCOPE OF REVIEW OF DECISIONS MADE BY ONE ACTING AS A FIDUCIARY.

Firestone's essential argument in this case is that in enacting ERISA, "Congress intended courts reviewing fiduciaries' benefits decisions to apply a deferential standard," Pet. Br. at 14, even where, as here, "a fiduciary has a conflict of interest," Pet. Br. at 20. But as the Chamber of Commerce and the National Association of Manufacturers acknowledge in their joint brief *amici curiae* (at 23 n.24), "This case is in a slightly unusual posture because respondents did not file any claim for severance pay with an administrator of the Firestone benefit plan." Thus, insofar as the court of appeals "analyzed the case under trust principles," its decision rests on an "*assumption* that the interpretation of the severance pay plan challenged by respondents was that of a fiduciary." *Id.* (emphasis added). The arguments of Firestone and its *amici curiae* are "based on the same assumption." *Id.*

That assumption is *contrary to fact*: Firestone did *not* purport to act as a fiduciary when the Company denied severance pay to plaintiffs. And on reflection, it seems to us that the Chamber and the NAM are correct in identifying that fact as pivotal to proper analysis of the problem posed here. Thus, it now seems to us that this case raises only a narrow question as to the appropriate scope of review of the decisions of one who should have but did *not* assume a fiduciary role in rendering benefit decisions, and that it is therefore incumbent upon us to suggest that the Court may wish to dismiss the writ of certiorari as improvidently granted or to adjudicate this case without addressing the broader issues

raised by Firestone concerning the scope of review under ERISA of decisions made by those acting in a fiduciary capacity.

A. There is no doubt that under ERISA the decision to grant or deny severance pay to plaintiffs *should* have been made by a fiduciary acting as such. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), expressly requires that employee benefit plans "be established and maintained pursuant to a written instrument," which instrument "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." Section 404, 29 U.S.C. § 1104, in turn, requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." Thus, under the Act, the decision whether to grant severance benefits to plaintiffs was to have been made by a fiduciary acting "solely in the interest of the participants and beneficiaries."

But, as noted in the Statement of Facts, at the time of the events in question in this case, Firestone did not understand that its policy of paying severance pay constituted an "employee welfare plan" regulated by ERISA. P. 5 *supra*. Firestone conceded as much in both the district court and the court of appeals. Thus, in opposing plaintiffs' motion for summary judgment in the district court Firestone stated:

> [U]ntil judicial decision in the early 1980's established that termination pay is a welfare benefit covered by ERISA, Firestone was unaware that ERISA applied to termination pay. [Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, December 6, 1985, at 33 n.12.]

And in the court of appeals Firestone acknowledged that the Company "had not before the sale [of the Plastics Division] treated its termination pay policies as an ERISA plan." Brief for Def. in C.A. No. 86-1448 at 24.

Consistent with these concessions, the record reflects that as of the time of the events at issue here, Firestone had not met *any* of ERISA's obligations with respect to severance plans. Firestone had *not* prepared a "written instrument" meeting the requirements of ERISA § 402;[11] Firestone had *not* prepared and distributed to employees a "summary plan description" for its plan, as required by ERISA § 102, 29 U.S.C. § 1021; Firestone had *not* prepared annual reports with respect to the plan as required by ERISA § 103, 29 U.S.C. § 1022; and Firestone had *not* established a procedure to enable those whose claims are denied to obtain "full and fair review" as required by ERISA § 503, 29 U.S.C. § 1133. Most important of all, the record reflects that at all times relevant herein Firestone had *not* appointed any "named fiduciaries . . . to control and manage the operation and administration of the plan" as required by ERISA § 402, 29 U.S.C. § 1102.

In the absence of a named fiduciary to administer the plan, Firestone, by operation of law, became the administrator, *see* ERISA § 3(16(A)(ii), 29 U.S.C. § 1002(16)(A)(ii), and, by operation of law, Firestone was a fiduciary with respect to the severance pay plan, *see* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). But the fact remains that in denying severance pay to plaintiffs Firestone was unaware of the applicability of ERISA and Firestone did *not* purport to act as a fiduciary. Rather, Firestone acted as an *employer* taking into account the range of interests that are relevant to

[11] Under § 402(c), the required written instrument must, *inter alia*, "describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan" and "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." Neither Firestone's Handbook nor its Manual—the only written documents with respect to the severance pay plan, *see* pp. 3-4 *supra*—satisfied these requirements.

employers, including, of course, the Company's financial interest.

B. Against this background, there is simply no room for Firestone to claim whatever shield of deference the law provides to those acting as fiduciaries to defend a decision the Company admittedly made *qua* employer. Insofar as deference is owed to a fiduciary's judgment as to whether a particular plan requires the payments of benefits to particular claimants—an issue we discuss in Part II *infra*—the *sine qua non* for any such deference is that the judgment was rendered by one acting as a fiduciary.

Trust law treats fiduciary decisions as a special class because fiduciaries undertake to act according to a special—and heightened—code of responsibility to the trust beneficiaries: "[n]ot honesty alone but the punctilio of an honor the most sensitive is . . . the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 454, 546 (1928) (Cardozo, C.J.). And whatever deference is paid to fiduciary decisions results from the courts' reluctance, absent proof of neglect by the fiduciary, to overturn a fiduciary's judgment as to how best to further the interests of the beneficiaries the fiduciary is charged with protecting. *See also* p. 24 *infra*.

That rationale by its terms is *inapplicable* where, as here, the decision under review was *not* made by one acting as a fiduciary but rather was made by an employer acting as an employer. To defer to such a decision would turn ERISA (and trust law) on its head.

For this reason we respectfully submit that the case does not raise any question concerning the scope of review of decisions made by one acting as a fiduciary, and the case therefore may not be worthy of a plenary decision by this Court.

II. EVEN IF FIRESTONE HAD ACTED AS A FIDUCIARY IN INTERPRETING THE SEVERANCE PAY PLAN TO BE INAPPLICABLE TO PLAINTIFFS, FIRESTONE'S SELF-INTERESTED INTERPRETATION OF THIS LEGAL DOCUMENT WOULD BE SUBJECT TO *DE NOVO* JUDICIAL REVIEW.

If, contrary to what we have just shown, Firestone had acted as a fiduciary in concluding that plaintiffs had not suffered a "reduction-in-force" within the meaning of the severance pay plan, the Court would then confront the question of whether, as Firestone claims, in enacting ERISA Congress intended the courts to "apply a deferential standard" of review as a matter of course to decisions of this nature. Pet. Br. at 14. It is to that question that we now turn.

A. Prior to the enactment of ERISA, there would have been no doubt as to the appropriate judicial role in adjudicating plaintiffs' claim that Firestone had misinterpreted the term "reduction-in-force" as used in the Handbook and Manual and, on the basis of that misinterpretation, had wrongfully failed to make severance payments to plaintiffs.

Pre-ERISA, a suit like this would not have implicated the historic law of trusts for the simple reason that, in adopting its severance pay plan, Firestone did not choose to create a trust. "A trust cannot be created unless there is trust property of such a nature as to be the proper subject of a trust." *Restatement (Second) of Trusts* § 66; *see* 2A A. Scott, *Scott on Trusts* §§ 66, 74 (4th ed. 1988). Yet Firestone's severance pay plan was entirely unfunded (as ERISA permits, *see* ERISA § 301(a)(1), 29 U.S.C. § 1081(a)(1)); Firestone did not dedicate any assets for the payment of severance benefits but rather elected to make such payments out of the Company's general treasury. Thus, pre-ERISA, plaintiffs could not have attempted to enforce the severance pay plan as a trust.[12]

[12] *A fortiori*, plaintiffs could not have sought review of Firestone's actions under § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 ("LMRA"), as that provision by its terms applies only to a special class of "trust fund[s]," *viz.*, those in which union representatives and employer representatives jointly serve as trustees.

Rather, under pre-ERISA law it was well established that a suit like this seeking redress for an employer's denial of unfunded welfare benefits to which employees claimed an entitlement sounded in *contract*.[13] Except in those cases in which the plan/contract expressly reserved to the employer the final authority to interpret the eligibility conditions of the plan,[14] the courts in these suits proceeded, as in any other contract case, to interpret the contract in accordance with standard principles of contract interpretation in order to determine whether a breach had occurred. *E.g.*, *Conner v. Phoenix Steel*, 249 A.2d 866 (Del. Sup. Ct. 1969); *Hart v. Carpenters Local 626*, 352 A.2d 423 (Del. Super. Ct. 1976); *Kitchens v. Atlantic Steel Co.*, 123 Ga. App. 812, 182 S.E.2d 530 (1971), *aff'd*, 228 Ga. 708, 187 S.E.2d 824; *Dangott v. ASG Industries, Inc.*, 558 P.2d 379 (Okla. Sup. Ct. 1976); *Rudditys v. Wing*, 81 Wis. 2d 667, 260 N.W. 2d 794 (1978); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *see also, e.g.*, *Frietzsche v. First Western Bank & Trust Co.*, 168 Cal. App. 2d 705, 336 P.2d 589 (1959); *Bird v. Connecticut Power Co.*, 144 Conn. 456, 133 A.2d 894 (1957); *Stevenson v. ITT Harper, Inc.*, 51 Ill. App. 3d 568, 366 N.E. 2d 561

[13] *See, e.g.*, 1 A. Corbin, CORBIN ON CONTRACTS § 125 p. 536 & n.68 (1950); 9 WILLISTON ON CONTRACTS § 1019 (3rd ed. 1967); Ziskind, *The Law of Employee Benefit Plans*, 1955 Wash. U. L.Q. 112, 117 (1955); Note, *Pension Plans & the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 917 (1970); *see also* S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 312-13 (1988).

[14] *E.g.*, *Clark v. New England Telephone*, 118 N.E. 348 (Mass. 1918); *McHorse v. Portland General Electric Co.*, 286 Ore. 323, 521 P.2d 315 (1974); *Rueda v. Union Pacific Railroad Co.*, 180 Ore. 133, 175 P.2d 778 (1946).

(1977); *Jacoby v. Gray's Harbor Chair & Mfg. Co.*, 77 Wash. 2d 911, 468 P.2d 666 (1970).[15]

Against this background, Firestone and its supporting *amici curiae* are reduced to arguing that ERISA worked a substantial *diminution* of the preexisting rights of employees under unfunded welfare plans. Without so acknowledging, Firestone's contention is that in ERISA Congress took from employees what were enforceable *contractual rights* to welfare benefits and left these employees instead with nothing more than a right to be

[15] Firestone is thus simply wrong in asserting, Br. at 25 n.22, that "[b]efore ERISA became effective, the decisions of employers who administered plans that were not governed by the LMRA were reviewed under the arbitrary and capricious standard." The handful of cases Firestone cites to support that proposition were all cases in which the employer *had created a funded trust* to administer a particular benefit plan, *and the trust instrument expressly reserved to the trustees the final authority to interpret the document and award benefits.* (The same is true of the cases the Chamber of Commerce and National Association of Manufacturers cite, Br. at 13-14, to support a similar claim.)

Firestone is equally wrong in claiming that the decision below, by subjecting Firestone's interpretation of the severance pay plan to *de novo* review, deviates from the "unanimous case law" in the lower courts under ERISA. Pet. Br. at 6. Although it is true that "[e]very circuit, including the Third Circuit, has approved application of the 'arbitrary and capricious' standard of judicial review" in reviewing certain benefit disputes under ERISA, *see* Pet. Br. at 8 & cases cited n.5, most courts of appeals also have reviewed *de novo* other types of benefit denials in unfunded plans—most often denials of health-care coverage to retired employees—in suits brought under ERISA. *E.g.*, *Steelworkers v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988); *Anderson v. Alpha Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986); *Mine Workers District 29 v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). In other cases the courts have "appl[ied] the arbitrary and capricious standard in name only." *Van Boxel v. Journal Co.*, 836 F.2d 1048, 1051 (7th Cir. 1987) (Posner, J.), *citing, e.g.*, *Haln v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983).

free from arbitrary or capricious action by the employer in deciding whether benefits are owed under the plan. According to Firestone, that consequence follows from the fact that ERISA imposes an obligation on those responsible for administering employee welfare plans to act as fiduciaries; because plan administrators are fiduciaries, Firestone contends, all of their actions—including their actions in interpreting plan documents—"are governed by trust principles, which include a deferential standard of judicial review." Pet. Br. at 9. As we proceed to show, Firestone's contention profoundly misunderstands both ERISA and the common law background against which the statute was enacted.

Our argument proceeds in two steps. In Part B we show that in addition to imposing fiduciary duties upon plan administrators and creating a cause of action to enforce those duties, ERISA also requires plan administrators to comply with duties imposed by the employee benefit plan *itself*, and ERISA creates a discrete cause of action to enforce such duties. Such actions—of which the instant case is one—are to be adjudicated under a judicially-developed "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 55 L.W. 4471, 4475 (April 6, 1987).

In Part C we show that under the federal common law, no deference is owed to a self-interested administrator's interpretation of the meaning of plan instruments, at least where, as here, nothing in the instruments themselves purport to commit such questions of interpretation to the discretion of the administrator. As we demonstrate, that conclusion is required both by the policies underlying ERISA and also by the law of trusts.

B. (1) There is no doubt that, as Firestone states, in enacting ERISA "Congress intended benefits decisions to be committed to the authority of fiduciaries who would

be subject to standards that had been developed in the common law of trusts." Pet. Br. at 14. As previously noted, ERISA § 402, 29 U.S.C. § 1101, requires every employee benefit plan to provide for "one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." And ERISA § 404, 29 U.S.C. § 1104, in turn, imposes on a fiduciary, in "discharg[ing] his duties with respect to a plan" a set of obligations, "derived from the common law of trusts," *Central States Pension Fund v. Central Tranp.*, 472 U.S. 559, 570 (1985), including the obligation to act "solely in the interest of the participants and beneficiaries" of the plan, and the further obligation to act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1), (a)(1)(D). Congress thus "intended these fiduciary standards to govern the ERISA claims-administration process." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 153 (1985) (Brennan, J., concurring).

It does not follow, however, as Firestone seems to believe, that § 404 states the *only* obligations of the fiduciary in making eligibility determinations, or that a suit for breach of the fiduciary duties is the *only* cause of action available to an employee who has been denied pension or welfare benefits. Firestone is able to make that claim only by ignoring § 502(a) of the Act, 29 U.S.C. § 1132(a)—ERISA's civil enforcement provision—which this Court has described as "one of the essential tools for accomplishing the stated purposes of ERISA," *Pilot Life Insurance Co. v. Dedeaux*, *supra*, 55 L.W. at 4474.[16] That section, insofar as relevant

[16] Firestone cites that section only once in passing in its 24-page discussion of the standard of review and, remarkably, Firestone has not even included § 502(a) in its compilation of statutory provisions involved in this case even though this is an action under § 502(a) to recover benefits claimed to be due.

here, creates three discrete causes of action in favor of plan participants to enforce discrete duties under the Act.[17]

First, § 502(a)(1)(B) authorizes a participant or beneficiary to sue

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

Second, § 502(a)(2) authorizes participants and beneficiaries to sue "for appropriate relief under section 409, [29 U.S.C. § 1109,]" the section of the Act which defines the remedies that may be obtained from a "fiduciary . . . who breaches any of the responsibilities obligations, or duties imposed upon fiduciaries by this title." And, finally, § 502(a)(3) authorizes suits by a participant or beneficiary

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan.

By its plain terms, then, § 502 recognizes that plan administrators are under *two discrete sets* of obligations: the fiduciary duties imposed by the Act itself and the separate duties imposed by "the terms of [a] plan." And § 502(a)(1)(B)—which "lies at the heart of [the] statute," *Metropolitan Life Insurance Co. v.*

[17] The fourth cause of action in favor of participants—created by subsection (1)(A) of § 502(a)—is an action for "the relief provided for in subsection (c)" of § 502, 29 U.S.C. § 1132(c); that subsection in turn authorizes the recovery of damages from a plan administrator "who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary." The second claim in this case arises under this subsection. *See* pp. 35-46 *infra*.

Taylor, — U.S. — , 55 L.W. 4468, 4470 (April 6, 1987) —creates a discrete cause of action to enforce these latter duties. Through this cause of action a participant may obtain "accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Pilot Life Insurance Co. v. Dedeaux, supra*, 55 L.W. at 4474; *see Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 474 U.S. at 146.[18]

(2) In enacting § 502(a)(1)(B) Congress declared that the actions thus authorized "are to be regarded as arising under the laws of the United States in similar fashions to those brought under § 301 of the Labor Management Relations Act [, 29 U.S.C. § 185]." H.R. Rep. 93-1280, 93rd Cong. 2d Sess. 32 (1974) (conference report), *reprinted in*, 3 *Legislative History of the Employee Retirement Income Security Act of 1974* at 4594 (hereinafter "Leg. Hist."). *See also* 3 Leg. Hist. 4745 (Senator Williams in introducing the conference report). Moreover, Congress made clear that just as the courts have developed a federal common law of labor contracts under LMRA § 301, *see Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), so, too, Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942, 3 Leg. Hist. at 4771 (Sen. Javits). Thus, "all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-

[18] Indeed, a suit under § 502(a)(1)(B) to enforce a plan may provide the *only* means by which participants can recover benefits due them. As noted in text, § 502(a)(2) provides for "relief under section 409" as the remedy for a breach of a fiduciary obligation and § 409 in turn provides "remedies that would protect the entire plan rather than . . . an individual beneficiary." *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. Similarly, an action lies under § 502(a)(3) only "*to enjoin*" fiduciary breaches or to "obtain other appropriate *equitable relief*."

regulated plans [must] be treated as federal questions governed by § 502(a)" and must be resolved under a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Insurance Co.* v. *Dedeaux, supra*, 55 L.W. at 4475.

The federal common law of labor contracts has been "fashion[ed] from the policy of our national labor laws." *Textile Workers v. Lincoln Mills, supra*, 353 U.S. at 456. In developing that law the Court has recognized that the LMRA itself "expressly furnishes some substantive law" and answers some problems that may arise under § 301; that "[o]ther problems will lie in the penumbra of express statutory mandates"; and that still other problems "will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.* And the Court has also recognized that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." *Id.* Any such state law is "absorbed as federal law" and does not provide "an independent source of private rights." *Id.*

By a parity of reasoning, the Court's task, in developing a federal common law of employee benefit plans, is to look first and foremost to the policies of ERISA, and to borrow state-law rules to the extent such rules will "effectuate" those policies. Although it is surely appropriate to look to the law of trusts as a principal source in developing this federal common law, the federal courts are not *obligated* to apply trust-law willy-nilly in ERISA cases. Indeed, the legislative history of ERISA shows that one reason for its enactment was Congress' conclusion that "reliance on conventional trust law often is *insufficient* to adequately protect the interests of plan participants and beneficiaries" as "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from testa-

mentary trusts both in purpose and in nature." S. Rep. 93-127, 93rd Cong. 2d Sess. 29 (1974), 1 Leg. Hist. 615 (emphasis added); H.R. Rep. 95-533, 93rd Cong. 2d Sess. 12 (1974), 2 Leg. Hist. 2359 (emphasis added).

C. (1) The task here, then, is to define, through the federal common law of employee benefit plans, the appropriate scope of judicial review with respect to claims of the type plaintiffs here assert. To do so it is necessary first to identify clearly the nature of plaintiffs' complaint.

In asserting that they were wrongfuly denied severance pay, plaintiffs here are *not* challenging the exercise of any authority which is inherently discretionary in nature. This case would be quite different if the plan had left it to the fiduciary to fix eligibility conditions, or if the plan contained eligibility conditions framed in a manner designed to leave such decisions to the judgment of the fiduciary rather than to fixed rules. Under such hypothetical plans the fiduciary's task is *not* confined to ascertaining the meaning of the settlor's instructions and executing those instructions; rather such plans require the fiduciary to make a discretionary judgment as to when and to what extent benefits should be paid. We agree with Firestone that when a court is called upon to review an exercise of such discretionary authority "the court[] must defer to those to whom decisionmaking authority has been committed" lest the court "improperly substitute [its] judgment for that of the person who has both the duty and the rightful authority to decide." Pet. Br. 10.

In this case, however, Firestone's severance pay plan did *not* call for the exercise of such discretion; the plan provided that severance benefits are to be paid to each and every employee terminated due to a "reduction in force" and to no others. "The [administrator's] duty . . . is to provide specific benefits to those who are entitled to then in accordance with the specific terms of [the] plan." *Central States Pension Fund v. Central Transp., supra*, 472 U.S. at 576-87. And plaintiffs' claim is simply that Firestone, as plan administrator, breached that duty because Firestone misconstrued the plan; *viz.*, that plaintiffs were "terminated" due to a "reduction-in-force" within the meaning of the severance pay plan and that therefore Firestone was obligated to pay, and plaintiffs were entitled to receive, severance benefits.

To be sure, the phrase "reduction in force" is not self-defining but rather is subject to alternative interpretations and thus in deciding whether to award benefits to plaintiffs, Firestone, as plan administrator, was required, in the first instance to render its best judgment as to the meaning of the critical phrase in the severance pay plan; *viz.*, to reach a decision as to whether, in its view, the term "reduction-in-force" as used in the plan encompasses terminations resulting from the sale of a plant as an ongoing business. That is as pure a question of plan interpretation as can be imagined. And nothing in the plan instrument itself purports to commit such a decision as to the meaning of that document to the discretion of the plan administrator or otherwise to render the administrator's view as to the meaning of the plan conclusive.

Against this background, the basic issue posed by this case can be formulated as follows: under the federal common law of employee benefit plans, are questions of plan interpretation to be treated, by operation of law, as judgments for plan administrators to make subject to only a limited power of judicial review to assure that the interpretation is not irrational or, absent some contrary expression in the plan instrument, are these questions—like contract interpretation questions generally—ones of law for the courts to resolve.

As the court below recognized, however, to frame the question for decision here at that level of generality ig-

nores the most salient fact about this case. The administrator who claims deference for its interpretation in this instance—who claims that its interpretation of the plan must prevail so long as that interpretation is not arbitrary—is the *employer* who would have to pay over six million dollars in benefits if a contrary interpretation of the plan were adopted. Moreover, as the court of appeals explained, "[b]ecause the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." Pet. App. A21-22.

In this case, then, as in any case involving an employer-administered unfunded benefit plan, the employer/plan administrator, in interpreting the eligibility rules in the plan, faces a conflict of interest to a degree unknown to the historic law of trusts. For whereas the law of trusts presupposes the existence of identifiable property held in trust from which trust benefits are paid, *see* p. 16 *supra*, in an unfunded, employer-administered employee benefit plan any benefits that are awarded are paid directly out of the pocket of the employer-fiduciary.[19]

It follows, then, that the dispositive question posed here can be reformulated as follows: under the federal

[19] Firestone argues that in some funded trusts—particularly some defined-benefit pension plans—the settlor/employer is obligated to contribute enough money to the trust to fund all claims that the trustees pay and that in these situations the employer trustees have the same type of conflict of interest as exists in an unfunded plan. *See* Pet. Br. at 21. But in these defined-benefit plans, the immediate impact of a decision to grant or deny benefits is on the *trust itself* and not on the employer; only if the total of *all* claims paid exceeds the actuarially anticipated amounts would benefit decisions by a trustee have a financial impact on the employer. Thus, the court of appeals' decision in the instant case as to the scope of review of the fiduciary's decision has no necessary implication with respect to the scope of review of questions of plan interpretation by employer trustees of a funded defined-benefit pension plan.

common law of employee benefit plans, are the federal courts required to defer to the interpretation of plan instruments adopted by a self-interested employer/plan administrator where the plan instruments themselves do *not* purport to vest the administrator with the power to authoritatively determine the meaning of those documents.

(2) Nothing in the text of ERISA itself answers this question or, indeed, answers any question concerning the scope of judicial review under § 502(a)(1)(B). The language of that section, authorizing a cause of action "to recover benefits due . . . to enforce . . . . . . rights . . . or to clarify . . . rights . . . under the terms of the plan" is, to be sure, suggestive; that language does not bespeak a cause of action whose only office is to provide for an administrative-type review of benefit claims decisions. *Cf.* § 706 of the Administrative Procedure Act, 5 U.S.C. § 706. But we do not claim that the bare words alone are so clear as to be determinative.[20] Nor so far as our research discloses, is there anything in the legislative history directly on point. It is thus necessary, in fashioning a federal common law rule here, to "look at

[20] Firestone suggests that two sections of ERISA in terms repose a discretionary authority in fiduciaries to interpret plans. *See* Pet. Br. at 9-10. But while ERISA § 402, requires that every plan must have a fiduciary with the authority to manage the plan, and while ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), defines the term "fiduciary" to include every person with discretionary authority in an employee benefit plan, nothing in those sections purport to determine the *amount* of discretion that must be vested in the fiduciary or to require that the fiduciary be authorized to determine the meaning of plan documents. Indeed, ERISA's legislative history reveals that the reason that § 402 requires one or more "named fiduciaries" for employee benefit plans is so that "the employees may know who is responsible for operating the plan," H.R. Rep. 1280, *supra*, at 297, 3 Leg. Hist. 4564 (conference report); the section thus was not intended as an allocation of authority with respect to questions of plan interpretation.

the policy of the legislation." *Textile Workers v. Lincoln Mills, supra*, 353 U.S. at 457.[21]

It is a commonplace that ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1985). In enacting ERISA Congress sought "to protect contractually defined benefits," *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at 148, and to assure, as this Court has said several times, "that if a worker ha[s] been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it," *Nachman v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980).

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[21] Although we have not found any direct discussion of the scope of review under § 502(a)(1)(B) in the legislative materials, it is noteworthy that, when Senator Javits first proposed creating a federal cause of action to enforce employee benefits plans in a bill that led directly to the enactment of ERISA, *see* S. 1103, § 504, 90th Cong., 1st Sess. (1967), he stated that his bill "permits private parties to sue for rights guaranteed by the bill *as well as for breach of any contract or trust guaranteeing them any rights.*" 113 Cong. Rec. 4653. This is the only explanation Senator Javits offered for the provision which found its way into each of the subsequent versions of his pension reform bills, the final one of which, S.4, 93rd Cong., 1st Sess. (1973), 1 Leg. Hist., ultimately was enacted by the Ninety-Third Congress as ERISA. *See* S. 2167, 91st Cong., 1st Sess. (1969); S.2, 92nd Cong., 1st Sess. (1971); S. 3598, 91st Cong., 2nd Sess. (1972). *See also* 2 Leg. Hist. 3376 (Rep. Dent) (ERISA includes "civil *contractual* remedies").

Firestone attempts to draw comfort from the fact that in enacting § 502(a)(1)(B), Congress rejected a proposal to require plans to provide participants with the option of submitting benefit disputes to arbitration or to judicial review. *See* Pet. Br. at 15-17. The only explanation the legislative materials give for why this provision was dropped in conference is Senator Javits' statement that the "House conferees were opposed . . . on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes." 120 Cong. Rec. 29941 (1974), 3 Leg. Hist 4769. But the fact that Congress rejected an arbitration requirement—which would have provided a means "for the resolution of minor benefit disputes for the many participants and beneficiaries who lack the resources to pursue their claims through the courts," *id.* (Sen. Javits)—says nothing about the standard of review Congress intended for those more consequential benefit disputes that are brought to court.

Firestone is even wider of the mark in attempting to rely on the fact that in 1982 a bill which would have provided *de novo* review of all decisions denying benefits was introduced in the House of Representatives by Representative Frank but was never acted on. *See* Pet. Br. at 19-20. It is well-settled that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). And in any event, the fact that the 1982 Congress failed to act on the Frank bill says nothing about that Congress' views as to the appropriate scope of review of the denial of benefits under ERISA.

These employee-protective purposes would be substantially undermined if the federal common law were to mandate deference to plan interpretations rendered by self-interested employer/plan administrators when nothing in the plan itself (or in the nature of the decision made by the administrator) requires such deference.

It is one thing to defer to a self-interested fiduciary's exercise of an inherently *discretionary* authority conferred upon the fiduciary by the plan itself; as Firestone correctly observes, in such situations—where there is, by hypothesis, no legal standard to control the fiduciary—the only alternative to such deference would be for the court to "substitute [its] judgment for that of the person who has both the duty and the rightful authority to decide." Pet. Br. at 10.

But the precise issue here is who has the "rightful authority" to determine the meaning of ERISA plans. And it would be quite another thing to *expand* the scope of the self-interested employer/administrator's authority beyond that provided for by the plan by holding that questions of plan interpretation—which the courts are competent to decide on their own as contractual ques-

tions[22]—are nonetheless committed to such administrators as a matter of law. Given what the court below aptly termed the "significant danger" that self-interested employer/administrators would abuse that authority if granted, the policies underlying ERISA require a federal common-law rule that, at least absent anything in the plan committing questions of plan interpretation to the administrator, leaves such questions of interpretation to the courts, rather than to the self-interested employer/administrator.[23]

(3) Contrary to Firestone's suggestion, nothing in the law of trusts requires or even supports a contrary conclusion; indeed if the law of trusts were directly applicable here—and it is not—or if the Court were to turn to that body of law to derive the federal common

[22] As the court below observed, questions of plan interpretation "do not usually turn on information or experience which expertise as a claims administrator is likely to produce." Pet. App. A22.

[23] Firestone argues that questions of plan interpretation can be committed to self-interested employer/administrators without danger because "ERISA provides a plethora of substantive constraints on fiduciaries' actions that together with the flexible arbitrary and capricious standard ensure the proper administration of benefit plans." Pet. Br. at 30. But ERISA § 404(a)(1)'s requirement that fiduciaries act "solely in the interest of the participants and beneficiaries" cannot meaningfully be applied to review decisions by a plan administrator as to the meaning of an unfunded plan, because given the open-ended obligation of the employer who has created such a plan to fund any benefits the administrator awards, it is *always* in the best interest of the participants and beneficiaries to interpret an unfunded plan in favor of coverage and it is *never* possible to ascertain whether an employer/administrator who has rejected such a pro-employee interpretation of the plan was animated by his own self-interest or by a disinterested judgment as to the proper meaning of the plan documents. Nor does the "arbitrary and capricious" rule provide significant protection against plan interpretations animated by the employer's self-interest, because under that rule the only question the court can decide is whether the employer/administrator has arrived at a *rational* interpretation of the plan.

law rule, the conclusion would be no different than the one derived from ERISA's policies.

(a) Insofar as Firestone looks to trust law to support its plea for deference, Firestone relies on the vernable principle codified in § 187 of the *Restatement (Second) of Trust*, that

> "*Where discretion is conferred upon the trustee with respect to the exercise of a power*, the exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." [Pet. Br. at 12.]

But Firestone proceeds as if the underscored clause did not exist, *viz.*, as if, under the law of trusts, *all* exercises of a power by a trustee were reviewable only to prevent an abuse of discretion. That is simply not the trust-law rule.

For purposes of determining the scope of judicial review of a trustee's action, the law of trusts draws a fundamental distinction between "mandatory" and "discretionary" (or "permissive") powers of trustees. As Professor Bogert explains in his treatise:

> The powers of trustees are . . . classified as discretionary and mandatory. . . . [I]f the power is discretionary, the trustee has a duty to employ his discretion in good faith, but the trustee has no duty to exercise the power. It is optional with him to use his power or to refrain from using it, unless to decline to exercise the power in light of the facts known to the trustee, would constitute bad faith toward the beneficiary. If, on the other hand, the power is mandatory, there is a positive duty to exercise the power by performing the act in question . . . [G. Bogert, *Trusts and Trustees* § 552 (2d ed. 1980); *see also Restatement (Second) of Trusts* § 186, Comment e & § 187, Comment a; 3 A. Scott, *Scott on Trusts* § 187 (4th ed. 1988)]

And if a power is mandatory

> The beneficiary has (1) the right that the trustee shall perform the trust in accordance with the directions of the trust instrument. . . . [I]f there is no grant of discretion of the trustee . . . the court may order that he perform a specific act. [G. Bogert, *supra*, § 861; *see also* 3 *Scott on Trusts* §§ 198.1, 199.1]

In this case, of course, Firestone, as plan administrator, was under a mandatory obligation to pay severance benefits to every employee terminated due to a "reduction-in-force." What is in dispute here is whether plaintiffs' termination constituted a reduction-in-force within the meaning of the plan. And in invoking *Restatement* § 187 to defend its resolution of that question, Firestone necessarily contends that the power to interpret the plan is, as a matter of trust law, itself a discretionary function of the fiduciary.

That contention rests on a concept that is alien to the law of trusts; trust law—like contract law—assumes that it is ordinarily for the *courts* to determine the meaning of legal documents such as trust instruments. As Professor Scott explains,

> The extent of the duties and powers of a trustee is determined by the rules of law which are applicable to the situation, and not the rules which the trustee or his attorney believes to be applicable, *and by the terms of the trust as the court may interpret them and not as they may be interpreted by the trustee himself or by his attorney.* [3 *Scott on Trusts* § 201 (emphasis added); *see also Restatement (Second) on Trusts* § 201, Comment b]

Indeed the law of trusts recognizes a special cause of action by which "the beneficiaries can maintain a suit in equity in order to obtain the instructions of the court to the trustee as to his duties," and the trustee "can ob-

tain instructions from the court," 3 *Scott on Trusts* §§ 199.1, 259.

This Court made this very point—and drew the critical distinction between mandatory and discretionary duties—in *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), in the course of overturning a lower court ruling which had found a portion of a trust fund agreement to be arbitrary and hence invalid under LMRA § 302. Writing for the Court, Justice Stevens explained that the court of appeals had

> relied upon cases in which trustees of employee benefit trust funds . . . fixed the eligibility rules and benefit levels. The court of appeals has held in those cases "that the Trustees have 'full authority with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustee's broad discretion has been abused by the adoption of arbitrary and capricious standards." [455 U.S. at 573.]

And Justice Stevens' explanation of why those cases were inapposite in *Robinson* is directly relevant here:

> Those cases, however, provide no support for the Court of Appeals' holding in this case. The petitioner trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement. *By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable federal law. The common law of trusts does not alter this obligation.* [*Id.* at 573-74.] [24]

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[24] For the reason explained by Justice Stevens in *Robinson*, Firestone's reliance in this case on the § 302 cases applying the arbitrary and capricious standard of review is wholly misplaced. *See* Pet. Br. at 13 & n.10.

(b) The foregoing doctrine is subject to one important caveat. Under the law of trusts, a settlor, in creating a trust, "may give the trustee power to construe the trust instrument in case of dispute or doubt." G. Bogert, *supra*, § 559. Such an instrument confers on the trustee a *discretionary* power—the power of interpretation—and thus, under the principles set forth above, "the trustee's decision will be subject to review by the courts as to its reasonableness." *Id.* But absent such an *express delegation* of interpretive authority to a trustee, it is for the courts to determine the proper meaning of trust instruments.[25]

These principles are well-illustrated by the many pre-ERISA cases in which an employee or retiree sued to obtain benefits from an employee benefit plan established in trust form. Those cases divide naturally into two groups: cases in which the trust instrument left it to the trustees to interpret the eligibility conditions set forth in the trust and cases in which the trust instrument established eligibility conditions but was silent as to whose function it was to interpret those conditions in cases of disputes.

In the former category of cases, the courts generally proceeded on the premise that what was involved was an exercise of discretionary authority, and the courts re-

[25] *See also Central States Pension Fund v. Central Transp., supra*, 472 U.S. at 568, in which the Court stated:

> The trustees' determination that the trust documents authorize their access to records here in dispute has significant weight, for the trust agreement explicitly provides that "any construction [of the agreement's provisions" adopted by The Trustees in good faith shall be binding upon the Union, Employees and Employers." . . . [T]hus, if our inquiry were merely an inquiry into the trust agreement, the trustes' right to conduct the audit in question would seem clear.

Cf. also Pray v. Belt, 26 U.S. 670, 680 (1828).

viewed the trustees' interpretation only for an abuse of discretion.[26] But in the latter cases the *courts proceeded on the premise that it was a judicial responsibility to determine the meaning of the trust, and where the courts determined that, properly understood, the trust required a payment of benefits in a particular case, the courts entered an appropriate order to that effect.*[27]

Thus, in this case, the meaning of the phrase "reduction-in-force" is a question for the *courts*, and not a question for the fiduciary to resolve in his discretion subject to only limited, deferential medical review.

III. FORMER EMPLOYEES CLAIMING A RIGHT TO BENEFITS UNDER AN EMPLOYEE BENEFIT PLAN ARE "PARTICIPANTS" ENTITLED TO RECEIVE, UPON WRITTEN REQUEST, CERTAIN SPECIFIED DOCUMENTS CONTAINING INFORMATION ABOUT THE PLAN.

In addition to asserting a claim for severance pay, plaintiffs' complaint sought damages for three of the individual plaintiffs whose requests for copies of Firestone's severance plan and stock plan were ignored by the Company. Plaintiffs predicated that claim on ERISA §§ 502(a)(1)(A), (c), which together authorize a "participant or beneficiary" to bring suit for damages "in the amount of up to $100 a day," to be awarded "in the court's discretion," against an administrator "who fails to comply with a request for any information which such administrator is required by this Title to furnish to a participant or beneficiary."

[26] *See, e.g.*, the cases cited by Firestone at 25 n.22 and those cited by the Chamber of Commerce and National Association of Manufacturers as *amici curiae* at 13-14.

[27] *E.g., Lamphere v. Old Second National Bank*, 39 Ill. App. 3d 610, 350 N.E. 2d 272 (1976); *Foss v. Mahal*, 230 N.W.2d 604 (Minn. 1975); *Frank v. Day's*, 13 Wash. App. 401, 535 P.2d 479 (1975); *see also* cases cited pp. 17-18 *supra*.

Firestone contends that the Company acted lawfully in failing to supply these plaintiffs with the requested documents because, according to Firestone, at the time of the requests the plaintiffs were no longer "participants" in the plans and hence were not entitled to any information about the plans. As we proceed to show, the language, structure, and history of the pertinent provisions of the Act belie Firestone's contention.[28]

A. ERISA §§ 101-111, 29 U.S.C. §§ 1021-31, contain a comprehensive set of disclosure provisions (as well as a set of reporting provisions which generally require plans to file various reports with the Secretary of Labor). These provisions are of two distinct types: provisions requiring disclosure automatically and without request, and provisions requiring disclosure in response to specific information requests.

Section 101(a), 29 U.S.C. § 1021(a), states the general rule with respect to automatic disclosure:

> The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

[28] It is important to bear in mind that at least with respect to plaintiffs Smolinski and Schade, who made request for documents pertaining to Firestone's severance-pay plan, Firestone's contention that those individuals were not participants rests on its claim that they were properly denied severance pay. Thus, under Firestone's theory, until a final determination is made with respect to the merits of plaintiffs' severance-pay claim, plaintiffs' status as participants *vel non* cannot be finally decided.

Because plaintiff Bruch made a request for documents pertaining to the stock plan but no longer claims that he was entitled to additional benefits beyond the stock he already had received under that plan at the time of his request, Bruch's status as a participant can be finally determined without further proceedings. For the reasons that follow, we submit that because Bruch was claiming additional benefits as of the time of his request, he was a participant entitled to the documents he sought.

> (1) a summary plan description described in section 102(a)(1); and
>
> (2) the information described in sections 104(b)(3) [statements and schedules summarizing the latest annual report] and 105(a) [statements of benefits accrued] and (c) [statement required by I.R.C. § 6057].

Section 104(b)(4), 29 U.S.C. § 1024(b)(4), in turn, states the analogous rule with respect to disclosure in response to an information request:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. . . .

Significantly, these two provisions use very different terms to define the class of persons to whom the disclosure obligation run. In recognition of the fact that the automatic disclosure provisions impose on benefit plans the obligation to locate and mail documents to certain individuals, § 101(a)(1) limits the application of these provisions to "each participant covered under the plan"—a phrase which the Department of Labor has treated as a term of art defined in an extensive set of regulations, *see* 29 C.F.R. § 2510.3-3(d)—and to "each beneficiary receiving benefits under the plan." In contrast, because under § 104(b)(4) the burden is upon the individual who wants to review a document to make a request and the only obligation on the plan is to furnish copies of certain readily-available documents upon request (and at the expense of the person making the request), that section grants this right of access to "*any* participant or beneficiary." [29]

[29] Similarly, ERISA § 104(b)(2), 29 U.S.C. § 1024(b)(2), which requires plan administrator to make certain documents available

In promulgating its regulation defining "participant under the plan," the Department of Labor highlighted the difference in coverage between the automatic disclosure requirements contained in § 101(a) and the on-request requirement contained in § 104(b)(4). In its preamble, the Department noted that ERISA's definition of "participant" is "broad enough to include many individuals whose interest in an employee benefit plan is minimal," and the Department agreed with commentators who had argued that requiring plans to provide plan documents automatically to all of these individuals might be unduly burdensome. 40 Fed. Reg. 24,642, 24,649. The Department concluded, however, that:

> Under section 101(a) of the Act, these documents must be furnished to each "participant covered under the plan," not to each participant. *By using the term "participant covered under the plan" Congress provided a ground for distinguishing between the class of all participants included within the meaning of section 3(7) of the Act and the class of participants who are entitled to receive copies of plan documents without charge and without request. . . .*
>
> Although under these paragraphs participants who are not covered under the plan will not be entitled to receive plan documents without charge and without request, they will be entitled to access to plan documents which the plan administrator must make available to all participants at appropriate locations under section 104(b)(2) of the Act. *They may also obtain copies of certain plan documents—including those which must be furnished to participants covered under the plan—upon written request at a reasonable charge under section 104(b)(4) of the Act. . . . These disclosure rights are sufficient to ensure*

for inspection at the "principal office of the administrator," provides for inspection of these documents "by any plan participant or beneficiary." The documents that must be available for inspection under § 104(b)(2) are the only documents that must be mailed upon request under § 104(b)(4).

> *that participants who are not covered under the plan and, therefore, not entitled to free distribution of plan documents will be able to obtain such information as may be necessary to protect their rights.* [40 Fed. Reg. at 24,649 (emphasis added).[30]

As the agency charged with the responsibility of administering ERISA's disclosure provisions, the Department of Labor's interpretation of those provisions is entitled to "great deference," *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and "should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). Thus, proper analysis must start from the premise that the § 104(b)(4) duty to provide documents on request is owed to a broader class of persons than the duty to make automatic disclosure under § 101(a), a class which "include[s] many individuals whose interest in an employee benefit plan is minimal." The task here, then, is simply to define the scope of that broader class. As we proceed to show, the court of appeals correctly included within that class employees and former employees who claim an entitlement to benefits under an employee benefit plant.

B. (1) ERISA § 3(7), 29 U.S.C. § 1002(7), defines the term "participant" to mean "any employee or former employee of an employer . . . who is *or may become* eligible to receive a benefit of any type from an employee benefit plan which covers employee of such employer. . ." This definition is sufficiently broad to encompass all employees or former employees who claim to be entitled to benefits under a plan and thus in a literal sense "may become eligible" to benefits based on a subsequent determination of their entitlement to benefits by either the

[30] In light of the foregoing, Firestone's reliance on the regulations defining "participant covered by the plan" to establish the scope of the class entitled to request documents under § 104(b)(4), *see* Pet. Br. at 35-36 & n.34, is wholly misplaced.

plan or the courts. Nothing in the statutory language requires that the class be limited to the narrow group identified by Firestone: employees or former employees who currently are eligible for benefits or who will become eligible for benefits upon the occurrence of a future contingency, such as satisfaction of an age or service requirement.

That Congress intended the broader, rather than the narrower reading of the term "participant" is clear from the other contexts in which that term is used in the Act. Most significant in this regard is ERISA § 503, 29 U.S.C. § 1133, which requires every plan to establish an administrative claims procedure. As part of that procedure, the plan must "provide adequate notice in writing to *any participant or beneficiary whose claim for benefits under the plan has been denied,*" and must "afford a reasonable opportunity to *any participant whose claims for benefits has been denied* for a full and fair review" of that decision (emphasis added). *See Pilot Life Insurance Co. v. Dedeaux*, *supra*, 55 L.W. at 4474 (describing § 503). In these provisions, Congress expressly used the term "participant" to describe individuals who have claims for benefits against a plan, including claims for benefits that have been "denied" by the plan, and therefore Congress necessarily contemplated that an individual would retain his status as a "participant" even if his claim for benefits were denied. In fact, these provisions would be rendered meaningless if Congress did not intend for the class of "participants" under ERISA to include employees or former employees who file such claims.

Similarly, ERISA § 102(b), 29 U.S.C. § 1022(b), requires that the plan description and the summary plan description—which, as previously noted, are among the documents that any participant or beneficiary may request under § 104(b)(4)—must contain "the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the

redress of claims which are denied in whole or in part." It is reasonable to believe that Congress expected a description of the claims procedure to be provided to all individuals with claims against the plan, and not simply to those employees or former employees who are conceded by the plan, or adjudged by a court, to be entitled to receive benefits.

(2) The legislative history of the reporting provisions of ERISA confirms that the phrase "any participant" should be read broadly rather than narrowly in order to accomplish the purposes underlying those provisions.

ERISA's reporting and disclosure provisions replaced the much more limited disclosure provisions of the Welfare and Pension Plan Disclosure Act ("WPPDA"), *see* Pub. L. No. 85-386, §§ 6-9, 72 Stat. 999-1002, *repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1). In enacting ERISA, Congress specifically found that the WPPDA was "inadequa[te]" to allow individual employees to "police their plans," and that the WPPDA needed to be strengthened so that "individual participants and beneficiaries will be armed with enough information to enforce their own rights." H.R. Rep. 93-533, *supra*, at 4, 11, 2 Leg. Hist. 2351, 2358; S. Rep. 93-127, *supra*, at 4, 27, 1 Leg. Hist. 590, 613. The House and Senate Committees elaborated:

> Experience has . . . demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted. [H. Rep. No. 533, *supra* at 11, 2 Leg. Hist. at 2358; Sen. Rep. No. 93-127, *supra*, at 27, 1 Leg. Hist. at 613.] [31]

[31] Although Firestone recognizes that "Congress considered the private enforcement provision in WPPDA to be ineffective," Pet.

The need of employees for information about their status under a plan was emphasized as well during the floor debates over ERISA. For example, Representative Erlenborn, a chief proponent of ERISA's disclosure requirements who served on the House Conference Committee and was a ranking member of the House Subcommittee on Labor that drafted these provisions, specifically noted that participants should have access to plan information even if they actually are not entitled to benefits:

> As a matter of fact, if people do have this sort of meaningful information made available to them, I think some of the unwarranted expectations that gave rise to the horror stories that people were not getting what they anticipated will be a thing of the past, *because many of them are based on what people anticipated getting that they never were entitled to, because they did not honestly know what was in*

Br. at 37-38, Firestone repeatedly argues that Congress "sought to strengthen [the WPPDA] by creating government enforcement mechanisms," *id.* at 38, 39, and *not* by "broaden[ing] the scope of the term 'participant' or the private enforcement mechanism with respect to a plan's disclosure obligations," *id.* at 36-37, 38, 39. These arguments are proven false, however, not only by the passages from the House and Senate Reports that are quoted in text, but also by comparing the applicable statutory provisions in the WPPDA and ERISA. For example, § 8(a) of the WPPDA required a plan to furnish, upon written request, a plan description and the latest annual report "to the participants and to the beneficiaries *covered by the particular plan,*" 72 Stat. 997, 1002 (emphasis added), whereas § 104(b)(4) of ERISA requires disclosure of these and other documents to "any participant or beneficiaries." Likewise, the enforcement provision found in § 9(b) of the WPPDA allowed damages against a plan administrator if he failed or refused to disclose documents to "a participant or beneficiary *covered by such plan.*" 72 Stat. 997, 1002 (emphasis added), whereas § 502(c) of ERISA allows damages against the administrator if he fails or refuses to disclose documents to "a participant or beneficiary."

> *their pension plan; they did not honestly know what their rights would be.* [120 Cong. Rec. 4284 (1974), *reprinted in* 2 Leg. Hist. at 3386-87 (emphasis added).]

Similarly, Representative Dent, another member of the House Conference Committee and the chairman of the House Subcommittee on Labor, noted that the disclosure provisions require that "a complete and full disclosure of a pension participant's standing within that pension plan be made available, and that it should be written in such a way that [an] individual[] would understand *exactly what his position was, what his entitlement was, and exactly where he stood at the moment of his inquiry.*" 120 Cong. Rec. 29,195 (1974), *reprinted in* 3 Leg. Hist. at 4665 (emphasis added). Indeed, the whole tenor of the discussion concerning disclosure to participants and beneficiaries emphasized the need for full and complete disclosure to all employees. In the words of Representative Biaggi, "the rules on disclosure of all information relating to pension funds are very, very strict. This is the only way abuse can be detected and corrected. Without information there is no protection. In this bill we are making sure there is going to be access to all relevant information." 120 Cong. Rec. 4287 (1974), *reprinted in* 2 Leg. Hist. at 3395.[32]

The purpose of Congress in enacting the disclosure provisions, as that purpose is explicated by the legislative materials, would not be served if the right to obtain plan information on request were limited to those employees or former employees who a plan concedes to be eligible (currently or in the future) for benefits. To the contrary, it was the clear intent of Congress to enable *all*

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[32] *See also* 120 Cong. Rec. 4278 (1974), *reprinted in* 2 Leg. Hist. at 3369 (statement of Representative Perkins) (ERISA "replaces the generalized reporting requirements of [the WPPDA] with disclosure and reporting requirements of a much more specific nature, which will give participants and beneficiaries a much better chance *to protect themselves*") (emphasis added).

interested employees to enforce their own rights against a plan, and that purpose can be accomplished only if all employees or former employees claiming benefits against a plan are granted access to plan documents upon request. As the court of appeals aptly concluded—and as common sense dictates—the congressional intent of "entitling people to information on the extent of their benefits, would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not. People who worked for a company for a time, and who are not certain whether or not they are entitled to benefits would obviously need the information . . . in order to know whether to press their claim." Pet. App. A42.[33]

C. Firestone contends that the appellate court's interpretation of the term "participant" would "turn plan administrators' disclosure requirements into an administrative nightmare." Pet. Br. at 40. This contention cannot withstand scrutiny.

The "administrative nightmare" perceived by Firestone is based on its mistaken view that all of the disclosure requirements of ERISA run to all "participants." As we have seen however, pp. 36-39 *supra*, the auto-

[33] The appellate court's conclusion in this regard is in general accord with the holdings of at least two other courts of appeals which have held that employees or former employees are "participants" if they have a "colorable claim" to benefits. *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 318; *Saldino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985); *cf. Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 660 (4th Cir. 1986) (individual listed as beneficiary but, denied benefits is a "participant" for purposes of filing a civil action). The Fifth Circuit originally reached a contrary conclusion, *see Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir. 1980), as Firestone correctly observes, *see* Pet. Br. 33 n.30, but apparently unbeknowst to Firestone, that court subsequently appears to have retreated from its prior ruling on this issue, *see Paris v. Profit Sharing Plan*, 637 F.2d 357, 362 (5th Cir. 1981), *cert. denied*, 454 U.S. 836.

matic disclosure provisions appearing in ERISA are limited in application by the language in §101(a) that disclosures must be provided only to "each participant *covered under the plan*," a phrase defined in detail by the Labor Department's regulations. The only disclosure requirements that apply to "*any* participant or beneficiary" are those triggered by a specific request by the participant or beneficiary. And complying with those provisions is relatively simple regardless of the breadth of the class to whom the provisions apply.[34]

[34] It is also worth noting that there are a variety of provisions in ERISA and its implementing regulations which serve to minimize whatever burdens might be imposed on plans by the operation of § 104(b)(4). For example, under ERISA § 104(a)(3), 29 U.S.C. § 1024(a)(3), the Secretary of Labor is authorized to "exempt any welfare benefit plan from all or part of the reporting and disclosure requirements," and numerous regulations have been adopted pursuant to that authority to exempt such plans from § 104(b)(4). *See, e.g.*, 29 C.F.R. § 2520-104.20(a)(2) (exempting certain welfare plans with less than 100 participants); *id.* § 2520-104.21(a)(1) (exempting certain group insurance arrangements); *id.* § 2520-104.24 (exempting welfare plans maintained for a selected group of management or highly compensated employees); *id.* § 2520-104.25 (exempting day care centers).

Similarly, under ERISA § 110, 29 U.S.C. § 1030, the Secretary of Labor is authorized to prescribe alternative methods of compliance for pension benefit plans if, *inter alia*, the application of any reporting or disclosure requirement would "increase the costs to the plan" or "impose unreasonable administrative burdens with respect to the operation of the plan." Again, the Secretary has exercised this authority by adopting regulations to reduce the burdens that may be imposed by § 104(b)(4). *See, e.g.*, 29 C.F.R. § 2520-104.23 (exempting pension plans maintained for a select group of management or highly compensated employees). In addition § 110 allows the administrator of any particular pension plan to seek an alternative method of compliance by filing a separate petition with the Secretary of Labor.

Finally, under § 502(c), the "$100 a day" penalty for failing to disclose plan documents under § 104(b)(4) is expressly subject to the exercise of "the court's discretion," and as a result that penalty has been imposed only in limited circumstances. In addition, ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), specifically allows the

Indeed, rather than increasing the burdens on employee benefit plans, a broad interpretation of the phrase "any participant" as used in § 104(b)(4) actually may *lessen* the overall administrative costs incurred by such plans. If employees or former employees who believe that they may be owed benefits under a plan were not entitled to obtain copies of the plan documents through requests made pursuant to § 104(b)(4), the employees' only recourse for obtaining such documents and for testing their entitlement to benefits would be first by submitting claims to the plan and ultimately by commencing civil litigation and discovery. Freely granting employees and former employees who claim benefits access to plan documents upon request thus can be expected to *lower* plan costs by decreasing the number of claims for benefits that plans must process and the number of lawsuits that plans must defend.

For all these reasons, the court below correctly concluded that so long as plaintiffs were pursuing a claim for benefits, they were "participants" entitled to be provided with plan documents on request.

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court to grant "a reasonable attorney's fee and costs of action to *either* party" (emphasis added), and this provision also may be utilized to discourage any frivolous or bad-faith lawsuits that might be filed under § 104(b)(4). *See, e.g., Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

In addition to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq., reprinted at Pet. App. A77-85, the following additional provisions of that Act are involved here:

§ 101, 29 U.S.C. §1021. Duty of disclosure and reporting

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

* * * *

§ 409, 29 U.S.C. § 1109. Liability for breach of fiduciary Duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * *

§ 502, 29 U.S.C. § 1132. Civil enforcement

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * *

(c) Any administrator (1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (2) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant for beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

* * * *

§ 503, 29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

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No. 87-1054

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,
v.
RICHARD BRUCH, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Rather than dealing with the detailed statutory analysis in Firestone's opening brief, respondents ("Bruch") and their amici merely cite a few isolated provisions of ERISA and snippets of history that, when viewed in context, do not support their position. They rely primarily on emotional appeals that affirmance of the decision on review will serve a single statutory "policy"—apparently not recognizing the well-documented fact that ERISA represents a balance between competing policies.

1. On the standard of review question, Bruch first asserts that this issue (which he raised in his complaint and repeatedly thereafter) may not properly be before the Court. If this were true, the Court should vacate the court of appeals' decision, not dismiss the writ of certiorari as Bruch suggests. In

fact, contrary to Bruch's assertion, Firestone was required to and did function as a fiduciary when it made the claims decision. Thus, the standard of review question is squarely presented here.

Bruch and his amici argue that the Court should adopt a de novo standard of judicial review in this case as a matter of federal common law, based on ERISA's authorization of a cause of action for recovery of benefits separate from an action for breach of fiduciary duty. However, a fiduciary's substantive duties specifically include the obligation to abide by the terms of the plan. The fiduciary provisions accordingly may not be ignored in a suit for benefits. Deferential review is required in such a suit because the fiduciary's authority to make claims decisions encompasses the discretion to interpret and apply the plan's eligibility criteria. ERISA's imposition of trust standards on the fiduciary effectively prevents any action based on his self-interest, and judicial deference to his decision accords with pre-ERISA benefits cases involving fiduciary standards.

2. On the "participant" question, Bruch and his amici primarily argue that the term "participant" should be read broadly in light of the intent of ERISA's disclosure provisions. They contend that this expansive interpretation of who is a "participant" will not create an undue burden on plan administrators because ERISA's so-called "automatic" disclosure requirements extend not to all "participants" but only to a subclass of "participants covered under the plan." Neither the language nor the history of the disclosure provisions provides any basis for this contention, and the Department of Labor's regulation defining a "participant covered under the plan" is therefore entitled to no judicial deference.

ARGUMENT

I. DE NOVO REVIEW OF AN EMPLOYER FIDUCIARY'S CLAIMS DECISION UNDER AN UNFUNDED BENEFIT PLAN IS CONTRARY TO THE MANDATE OF ERISA.

A. The Question of the Scope of Review of a Fiduciary's Determination of an Employee Benefits Claim Is Properly Before the Court.

Bruch begins his argument on the standard of review question by suggesting that the writ of certiorari should be dismissed as improvidently granted because Firestone allegedly was not, or did not "purport" to be, a "fiduciary." (Brief for Respondents ("Bruch Brief") at 12-15) Even if these factual allegations were true—which they are not—they would require this Court not to dismiss the writ but to vacate the decision of the court of appeals, which was premised on Firestone's status as a fiduciary.

Bruch's argument is based entirely on the fact that when Firestone made the benefits decision, it was unaware that ERISA applied to termination pay. (*See* Bruch Brief at 13) This fact fails to prove either that Firestone did not believe it was a fiduciary or that Firestone was not a fiduciary.

Indeed, an employer or other person may be a fiduciary even though he does not know that he is subject to ERISA. *See Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Industries*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd sub nom. Roberts v. Burlington Industries*, 477 U.S. 901 (1986); *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2220-21 & n.10 (1987). A person may even be a fiduciary without knowing that he is subject to any fiduciary standards at all. *See* I A. Scott & W. Fratcher, *Scott on Trusts* ("*Scott on Trusts*") § 17.1 at 226-27; *id.* § 23 at 249-50 (4th ed. 1988).

Firestone's termination pay plan is a trust under the statutory mandate of ERISA. (*See* Brief for Petitioners ("Firestone Brief") at 11-14, 17-19, 22-25) Bruch alleged in his complaint that Firestone was the named fiduciary of the plan (*see* JA95 ¶ 10, JA96 ¶ 13) and argued that Firestone breached its fiduciary duties under ERISA in denying respondents the termination pay that they claim under the terms of the plan (*see* Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 97, 98-99). Given this history Bruch can hardly argue in this Court that Firestone was not a fiduciary.

The fact is that Firestone's conduct as the manager of its termination pay plan demonstrates that it was functioning as a fiduciary. Notwithstanding Bruch's assertion to the contrary (*see* Bruch Brief at 14-15), the uncontradicted evidence of record is that the only reason Firestone denied respondents' claim was its conclusion that they were not entitled to termination pay under the terms of the plan. (*See* Deposition of Thomas E. Robinson at 145) The record also shows that Firestone was scrupulous in applying the plan uniformly to past and subsequent plan participants. (*See id.* at 145, 154; JA118-JA121) Thus, Bruch's assertion that Firestone was not acting as a fiduciary lacks any support in the record, and this case does present the question of the scope of review of a fiduciary's benefits decision.

B. ERISA's Legislative Scheme Requires Courts To Review Plan Fiduciaries' Benefits Decisions Deferentially.

1. The enforcement provisions of ERISA do not justify creation of a federal common law to govern suits for benefits that ignores the statute's fiduciary provisions.

Bruch and his amici attempt to evade the statutory analysis of ERISA's fiduciary provisions in Firestone's brief by asserting that an action to recover benefits under the terms of an ERISA plan is governed by a federal common law drawn

not from those provisions but from the "policy" of ERISA to "protect the interests of plan participants and beneficiaries." (Bruch Brief at 23; *see also* Brief for the United States ("DOL Brief") at 9, 20) In fact, as this Court has long recognized, Congress struck a balance in ERISA between the policy identified by Bruch and the counteracting policy of encouraging employers to maintain existing plans and develop new ones. (*See* Firestone Brief at 9, 14) Moreover, any federal common law developed by the courts must be consistent with ERISA's language and structure.

Bruch argues that ERISA's fiduciary provisions are not relevant to suits for benefits because the statute's civil enforcement provision, section 502(a), 29 U.S.C. § 1132(a),

> recognizes that plan administrators are under *two discrete sets* of obligations: the fiduciary duties imposed by the Act itself [enforced under section 502(a)(2), 29 U.S.C. § 1132(a)(2)] and the separate duties imposed by 'the terms of [a] plan' [enforced under section 502(a)(1)(B), *id.* § 1132(a)(1)(B)].

(Bruch Brief at 21 (emphasis in original); *see also* Brief of American Association of Retired Persons ("AARP Brief") at 4-5; Brief for the Pension Rights Center ("PRC Brief") at 4-6) This argument ignores section 404(a)(1)(D) of ERISA, which sets forth a fiduciary's duty to act "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). A fiduciary thus has only *one* set of obligations: the fiduciary duties imposed by ERISA itself "to serve the interests of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 (1985).

In fact, section 502(a) of ERISA does not even purport to define the substantive rights of participants or beneficiaries. The provision (consistent with the heading of Part 5 of the statute, entitled "Administration and Enforcement") merely identifies who may bring civil actions and what relief they

may seek. The relief available under section 502(a)(2) takes the form of personal liability of the fiduciary to the plan as a whole. *See Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. at 140-44. Benefits due an individual participant or beneficiary may be obtained only through a suit under section 502(a)(1)(B), which is brought against the plan as an entity. *See Mackey v. Lanier Collections Agency & Service*, 108 S. Ct. 2182, 2187 & n.7 (1988). The existence of two enforcement mechanisms does not create two sets of statutory duties.

Bruch contends that courts are to resolve claims under section 502(a)(1)(B) under a federal common law created by "look[ing] first and foremost to the policies of ERISA, and . . . borrow[ing] state-law rules to the extent such rules will 'effectuate' those policies." (Bruch Brief at 23; *see also* DOL Brief at 9) However, the very case relied upon by Bruch held that a court must first consult the express language of the statute, then the statutory structure or "the penumbra of express statutory mandates," and only as a last resort "the policy of the legislation." *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *see also University of Tennessee v. Elliott*, 478 U.S. 788, 795-96 (1986); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981).[1] It is to ERISA's language

1. The legislative history of ERISA cited by Bruch (*see* Bruch Brief at 22) does not sanction development of a federal common law that ignores the statutory language. The statement in the Conference Report that suits to recover benefits under the plan "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947" (H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5107, *and in* 3 *Legislative History* 4277, 4594) merely clarifies that state courts hearing these cases under section 502(e)(1), 29 U.S.C. § 1132(e)(1), are nevertheless to apply federal law and that suits for benefits are removable to federal court. *See Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549, 1557 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542, 1547 (1987). Read in context, Senator Javits' statement that "it is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans" (120 Cong. Rec. 29,942 (1974), *reprinted in* 3 *Legislative History* 4771) is a reference to the fact that Congress preempted state law with respect to all of the areas addressed by ERISA. *See* 29 U.S.C. § 1144(a).

and structure—so consistently avoided by Bruch and his amici—that we now turn.

2. ERISA grants claims authority and discretion to plan fiduciaries.

Bruch urges the Court to adopt as federal common law the rule that a plan fiduciary such as Firestone does not have discretion to make benefits decisions unless the plan document itself grants him such discretion. (Bruch Brief at 27-30)[2] However, there is no basis on which the Court may fashion such a rule because, in Bruch's own words, "[t]here is no doubt that, as Firestone states, in enacting ERISA 'Congress intended benefits decisions to be committed to the authority of fiduciaries. . . .'" (*Id.* at 19; *see* Firestone Brief at 9, 10 & n.6)

In order to circumvent his own acknowledgement of congressional intent, Bruch attempts to draw a distinction between the authority to make benefits decisions and the authority to determine the meaning of the plan. (*See* Bruch Brief at 25) He then asserts that plan fiduciaries have only the former type of authority under either ERISA or trust law. (*See id.* at 29-30, 32-33) His arguments are patently without merit.

A named fiduciary has authority pursuant to sections 402(a)(1) and 503 of ERISA, 29 U.S.C. §§ 1102(a)(1) and 1133, to make all claims decisions.[3] Thus, he necessarily has

2. Because Bruch never made this argument in the district court, Firestone included only the substantive terms of its termination pay plan and a summary thereof in the record. (*See* JA118 ¶¶ 3-4, JA121 ¶ 11) The record nonetheless demonstrates that Firestone had the discretion to interpret the plan and to apply it to specific situations. (*See* JA118 ¶ 3)

3. Contrary to Bruch's assertion (*see* Bruch Brief at 27 n.20; *see also* AARP Brief at 8), section 402(a)(1) is a substantive grant of authority and not merely a disclosure requirement. The provision appears in Part 4 of ERISA (entitled "Fiduciary Responsibility") rather than in Part 1 of ERISA (entitled "Reporting and Disclosure") and states that the named fiduciary "*shall* have the authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(1) (emphasis added).

the authority to interpret the eligibility criteria established by the plan and to apply them to the facts at hand. The Department of Labor itself has concluded that such decision-making authority is discretionary by its very nature. *See* 29 C.F.R. § 2509.75-8D-3; 29 U.S.C. § 1002(21)(A).[4]

Moreover, this Court has already held that

> rather than explicitly enumerating *all* of the powers . . . of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority. . . .

Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, 472 U.S. 559, 570 (1985) (emphasis in original).[5] Courts applying trust law have readily concluded that a grant of authority to a fiduciary to make claims decisions includes the discretion to interpret the eligibility criteria

4. Even if the amount of discretion vested in a fiduciary were unclear (*see* Bruch Brief at 27 n.20), ERISA would still foreclose the adoption of a de novo standard of review because that standard affords *no* discretion to fiduciaries.

5. In support of its contention that contract rather than trust law should govern this case, the Department of Labor asserts that the drafters of ERISA intended "only selective adoption of trust rules." (DOL Brief at 18) However, the Senate Report relied on by the Department stated that traditional trust law was "insufficient" to protect the interests of plan beneficiaries only to the extent that it permitted "exculpatory clauses" that relieved trustees from liability for breach of fiduciary duty or permitted trustees to make investments that might otherwise be considered imprudent. See S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865 *and in* 1 *Legislative History* 587, 615. Obviously, no such exculpatory clause is at issue in this case. Nor does the Senate Report's statement that courts should "bear[] in mind the special nature and purposes of employee benefit plans" *(id.)* support the Department's position. Similar language appears in the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 501(a), which subjects union representatives to fiduciary standards and requires them to hold money and property for the sole benefit of union members "taking into account the special problems and functions of a labor organization. . . ." Congress intended this provision merely to codify the flexibility already inherent in the common law of trusts. *See* H.R. Rep. No. 741, 86th Cong., 1st Sess. 81 (1959).

and apply them to particular cases. *See, e.g., Miller v. Associated Pension Trusts*, 541 F.2d 726 (8th Cir. 1976); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762 (Okla. 1955); *Forrish v. Kennedy*, 377 Pa. 370, 105 A.2d 67 (1954) (cited with approval in legislative history of WPPDA; *see* Firestone Brief at 17); *see also* III *Scott on Trusts* § 187.2 at 33-34; Restatement (Second) of Trusts § 186 Comment d (1959). Even when the trust instrument does not expressly grant any authority to the trustee, courts have concluded that a fiduciary has the inherent discretion to interpret the eligibility criteria set forth in the trust document. *See Fleishman v. Blechman*, 148 Cal. App. 2d 88, 306 P.2d 548 (1957); *Kloman v. Doctors Hospital*, 76 A.2d 782 (D.C. 1950); *Van Pelt v. Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E.2d 858 (1965).[6]

While Bruch correctly notes that "it is ordinarily for the *courts* to determine the meaning of legal documents such as trust instruments" (Bruch Brief at 32 (emphasis in original)), the authority on which he relies states that courts review trust documents only to determine "[t]he extent of the duties and powers of [the] trustee." *See* III *Scott on Trusts* § 201 at 221. Bruch's reliance on *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982) (*see* Bruch Brief at 33), as supporting de novo review here is equally misplaced. In *Robinson*, this Court held that plan fiduciaries could not be sued on a claim that the terms of a plan were unreasonable because the terms were set by the collective bargaining agreement, not by the fiduciaries. Notably, the Court cited with approval cases holding that when the fiduciary has "full authority" to determine eligibility requirements, their decisions are subject *only* to a reasonableness requirement. 455 U.S. at 573.

6. *See also Woodward v. Dain*, 109 Me. 581, 85 A. 660 (1913); *Copp v. Worcester County National Bank*, 347 Mass. 548, 199 N.E.2d 200 (1964); *Commonwealth-Merchants Trust Co. v. Seglie*, 127 N.J. Eq. 160, 12 A.2d 153 (Super. Ct. Ch. 1940); *Ireland v. Ireland*, 84 N.Y. 321 (1881). The Solicitor General has previously acknowledged that a trustee's duties include the "exercise of discretion with regard to benefit eligibility and other similar matters" and the "resol[ution of] eligibility questions between the independent trust and the beneficiaries." Brief of the National Labor Relations Board in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) (No. 80-289) at 37, 38.

Bruch finally urges that whatever claims discretion other fiduciaries may have, a court should not defer to the decision of an employer fiduciary of an unfunded plan. (Bruch Brief at 25-26; *see also* DOL Brief at 11-12)[7] However, as demonstrated at length in Firestone's opening brief, Congress not only refused to vary the scope of a fiduciary's authority in these circumstances, it also expressly permitted an employer fiduciary of an unfunded plan to exercise full authority with respect to claims decisions despite any potential conflict of interest that arises. (*See* Firestone Brief at 22-27 & n.25)[8] Neither Bruch nor his amici suggest how the Court can legitimately ignore the express language of the statute on these points.

3. A deferential standard of review under ERISA would not provide less protection to employees than prior benefits law.

Bruch argues generally that application of the arbitrary and capricious standard in cases such as this one would result in a "diminution" of employees' benefits rights under ERISA as compared to prior law. (Bruch Brief at 18) In the handful of

7. Four of the five cases that Bruch asserts applied de novo review to unfunded plans (*see* Bruch Brief at 18) involved the question whether the employer could terminate the plan under the terms of a collective bargaining agreement. *See United Steelworkers v. Connors Steel Co.*, 847 F.2d 707 (11th Cir. 1988); *In re White Farm Equipment Co. (Hansen v. White Motor Corp.)*, 788 F.2d 1186 (6th Cir. 1986); *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). The only case cited by Bruch that considered whether a plan fiduciary correctly interpreted the terms of the plan expressly refused to follow the decision on review here and applied the arbitrary and capricious standard. *See DeGeare v. Alpha Portland Industries*, 837 F.2d 812 (8th Cir. 1988).

8. Bruch simply is incorrect in contending (*see* Bruch Brief at 26) that Firestone "face[d] a conflict of interest to a degree unknown to the historic law of trusts." Common law courts regularly have deferred to the decisions of trustees even when the trustee's decision effectively took money from the beneficiary's pocket and put it in his own. *See, e.g., Raffety v. Parker*, 241 F.2d 594 (8th Cir. 1957); *Lovett v. Peavy*, 253 Ga. 79, 316 S.E.2d 754 (1984); *Svenson v. First National Bank*, 5 Mass. App. Ct. 440, 363 N.E.2d 1129 (1977); *In re Cowen's Estate*, 148 Misc. 35, 265 N.Y.S. 40 (Sur. Ct. 1933).

pre-ERISA contract cases he cites, however, the benefits administrator was not subject to the substantive fiduciary standards imposed by ERISA. Congress chose to adopt trust principles rather than contract principles "precisely because fiduciary standards long established in equity would best protect employee beneficiaries." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981).[9]

To the extent that the Court determines the appropriate standard of review by turning to pre-ERISA law, the pertinent cases are those in which the benefits administrator—like the plan fiduciary under ERISA—was subject to trust-based standards. State law cases imposing such standards on benefits administrators uniformly adopted a deferential standard of review of the administrator's decision. *See, e.g., Reese v. Administrative Committee of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 32 Cal. Rptr. 818 (1963); *Kloman v. Doctors Hospital*, 76 A.2d 782 (D.C. 1950); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762 (Okla. 1955); *Forrish v. Kennedy*, 377 Pa. 370, 105 A.2d 67 (1954).

Cases decided under section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), conclusively demonstrate that the imposition of trust-based standards requires the adoption of a deferential standard of review. As noted in Firestone's opening brief, section 302(c)(5) applies to benefit plans that are part of an actual contract that has been collectively bargained, as opposed to a theoretical "unilateral contract" that an employee "accepts" by not quitting his job. (*See* Firestone Brief at 13 &

9. Bruch's reliance on Senator Javits' statement that his bill permitted employees to sue for "breach of any contract or trust guaranteeing them any rights" (*see* Bruch Brief at 28 n.21) is wholly misplaced. The Senate bills of which Senator Javits was a sponsor did not apply the fiduciary standards to unfunded plans (*see* Firestone Brief at 24 n.21), did not grant claims authority to fiduciaries (*see id.* at 15-16), and did not preempt state law with respect to claims for benefits (*see* H.R. 2 in the Senate, 93d Cong., 2d Sess. § 699, 120 Cong. Rec. 4977 (1974), *reprinted in* 3 *Legislative History* 3599, 3820-21). By contrast, ERISA imposes trust standards on and grants decision-making authority to all fiduciaries, including those who administer unfunded plans, and preempts state law while directing federal courts to look to the common law of trusts.

n.11) Despite the obvious "contractual" aspects of these plans, courts have uniformly applied the arbitrary and capricious standard of review under section 302(c)(5) because the trustees are subject to trust-based standards, including a "sole benefit" standard nearly identical to that imposed by ERISA.[10] The arbitrary and capricious standard of review is equally applicable to Firestone's termination pay plan, because whether the plan is viewed as a contract or not, it is indisputably subject to ERISA's fiduciary standards.[11]

II. THE NAMED PLAINTIFFS ARE NOT "PARTICIPANTS" WITHIN THE MEANING OF ERISA SIMPLY BY BEING FORMER EMPLOYEES WHO CLAIM TO BE ENTITLED TO BENEFITS.

A. The Expansive Reading of the Term "Participant" Urged by Bruch and His Amici Ignores the Language and Legislative History of ERISA.

Neither Bruch nor his amici cite any basis in ERISA for interpreting the term "participant" to cover a former employee whose only connection to the plan is his claim of entitlement

10. Two of the supposed "significant differences" between section 302(c)(5) of the LMRA and ERISA that AARP asserts make the standard of review developed under the former statute "inappropriate" under the latter (*see* AARP Brief at 11-12) were refuted in Firestone's opening brief (*see* Firestone Brief at 22-25, 28 & n.27). AARP's two other "differences" are no more persuasive than the others. Although the LMRA does not contain a specific jurisdictional provision authorizing civil actions to recover benefits (*see* AARP Brief at 11), courts have regularly assumed jurisdiction of suits for benefits under section 302(c)(5) (*see* Firestone Brief at 13 & n.10). And while section 302(c)(5) trustees were "often" given authority to make rules as well as to apply rules made by others (*see* AARP Brief at 12), courts have reviewed the exercise of both types of authority deferentially because the trustees were subject to fiduciary standards. *See, e.g., Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1977); *Beam v. International Organization of Masters*, 511 F.2d 975 (2d Cir. 1975); *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958); *Bono v. Kramer*, 346 Mass. 355, 191 N.E.2d 760 (1963).

11. As Bruch recognizes (*see* Bruch Brief at 34-35), the arbitrary and capricious standard would also apply even under contract law if Firestone had claims discretion—as is certainly the case (see pp. 7-9, *supra*).

to benefits.[12] The opposing briefs ignore the eligibility criteria in the plan that define who is a "participant" (*see* Firestone Brief at 34, 38-39) and fail to respond to Firestone's critical point: when a court rules in a claimant's favor, he has not "become" eligible for benefits but rather "is" and always has been so eligible (*see id.* at 34-35 n.33).[13]

Instead of analyzing the definition of "participant" or its use in ERISA, Bruch and his amici baldly assert that the disclosure provisions of the statute demonstrate the congressional intent that the term be "read broadly." (Bruch Brief at 41; *see also* DOL Brief at 26-27; AARP Brief at 16; PRC Brief at 18) However, the disclosure provisions are written to apply only to "participants" and "beneficiaries" (*see* 29 U.S.C. §§ 1021-1025), and the very excerpts from the major reports on ERISA quoted by Bruch[14] speak of the intent to provide information to these two classes of individuals—not to "claimants" (*see* Bruch Brief at 41).[15] Thus, the disclosure provisions

12. Contrary to Bruch's suggestion (*see* Bruch Brief at 35, 36; *see also* DOL Brief at 7; AARP Brief at 14), no court has found that Firestone failed to furnish any individual plaintiff with information he requested. The district court held only that Firestone was not required to respond to the requests because the plaintiffs were not "participants" (*see* A71-A72), and the court of appeals did no more than reverse this holding and remand the section 502(c) claims for further proceedings in the district court (*see* A41-A43).

13. The Department of Labor is plainly wrong in stating that Firestone "endorses" the view of the Fifth Circuit that the phrase "may become eligible" in ERISA's definition of "participant" refers only to current employees. (*See* DOL Brief at 24 n.23; *compare* Firestone Brief at 34-36) Bruch's analysis of Fifth Circuit law (*see* Bruch Brief at 44 n.33) is therefore beside the point. It also is misleading. *Compare Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), *with* the later *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

14. While two of the four statements quoted by Bruch (those of Representatives Erlenborn and Biaggi) do not explicitly refer to "participants" (*see* Bruch Brief at 42-43), these isolated remarks, even if they supported Bruch's view, are of no sigificance given the numerous contrary expressions of congressional intent in the statutory language and accompanying reports. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

15. The Department of Labor has omitted the references to "partici-

of ERISA do not support an expansive interpretation of the term "participant."

Bruch attempts to derive further support for a broad reading of the term "participant" from section 503 of ERISA, which requires that "any participant . . . whose claim for benefits under [a] plan has been denied" be informed of the reasons for the denial and given an opportunity for review of the decision by the named fiduciary. 29 U.S.C. § 1133. (*See* Bruch Brief at 40) The references to a participant "whose claim for benefits . . . has been denied," however, speak of a preliminary denial, subject to further review by the named fiduciary of the plan. Section 503 does not address Bruch's contention that mere claimants are *ipso facto* participants.[16]

In fact, section 503 establishes, contrary to the position of Bruch's amici (*see* AARP Brief at 16; DOL Brief at 25, 27; PRC Brief at 22-23), that named fiduciaries are to determine employees' rights to benefits (subject to judicial review). This Court has held that ERISA's disclosure requirements similarly give plan administrators the responsibility to determine "who is in fact a plan participant." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, 472 U.S. at 572.[17] Obviously, plan administrators and fiduciaries are to determine who is a participant or beneficiary by looking to the terms of the plan, not by identifying those individuals who claim to be entitled to benefits.

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pants" in its quotations from the legislative history of ERISA. (*Compare* DOL Brief at 26-27 *with* Bruch Brief at 41)

16. Of course, most employees or former employees claiming benefits are or may become entitled to other benefits under the plan and thus remain participants regardless of how their pending claim is ultimately resolved.

17. This responsibility is derived from "the fundamental common-law duties of a trustee . . . to 'investigate the identity of the beneficiary when the trust documents do not clearly fix such party' and to 'notify the beneficiaries under the trust of the gifts made to them.'" *Id., quoting* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 583 at 346, 348-49 n.40 (2d rev. ed. 1980).

B. There Is No Basis in ERISA for Distinguishing Between "Participants" and "Participants Covered Under the Plan."

Bruch and his amici attempt to justify their overexpansive interpretation of the term "participant" by asserting that a plan administrator will be obliged to disclose information to the broad group of "participants," which includes virtually all employees and former employees, only upon request. The detailed information that the administrator must disclose automatically and on a regular basis is alleged to be due only to a narrower group of "participants covered under the plan." (*See* Bruch Brief at 36-37; DOL Brief at 27-29; PRC Brief at 18, 21) The purported distinction between a "participant" and a "participant covered under the plan," while creative, is totally unsupported by the language and history of ERISA.

A "participant" obviously participates *in* something—in this case, an employee benefit plan. To say that a participant is "covered under" a plan is a way of describing in a passive way his participation "in" a plan. Thus, no plain meaning can be given to the concept of a participant *not* "covered under the plan."[18]

Bruch and his amici base their argument on a solitary reference in ERISA to a "participant covered under the plan." This reference appears in section 101(a), 29 U.S.C. § 1021(a), which states the administrator's general disclosure obligations and refers to other provisions to explain exactly *what* must be disclosed and *how* that material must be disclosed and reported.[19] Section 101(a) refers to section 104(b), *id.* § 1024(b),

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18. Since section 3(7) of ERISA defines the term "participant" to include an employee or former employee who is or may become eligible to receive a benefit from a plan "which covers employees" of his employer, 29 U.S.C. § 1002(7), all participants are "covered under the plan" from which they are or may become eligible to receive benefits.

19. Section 101(a), which is quoted in the Bruch Brief at 1a, sets forth the administrator's obligation to furnish "in accordance with" section 104(b), 29 U.S.C. § 1024(b), certain items and information "described in"

as governing the method of disclosure.[20] Because section 104(b) contains two non-automatic disclosure obligations, Bruch is simply incorrect in asserting that section 101(a) "states the general rule with respect to automatic disclosure." (*See* Bruch Brief at 36; *see also* DOL Brief at 28)[21]

The clearest refutation of Bruch's position is the language of section 104(b), which not only does not refer to "participants covered under the plan" but also does not differentiate between the recipients of automatic disclosures and disclosures upon request.[22] If Congress intended to make such a distinction, surely the specific provision of ERISA governing disclosure would indicate this fact.

Bruch and the Department of Labor fare no better in maintaining that the legislative history of ERISA reflects a

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sections 102(a)(1), 104(b)(3), and 105(a) and (c), *id.* §§ 1022(a)(1), 1024(b)(3), and 1025(a) and (c).

Section 101(b), 29 U.S.C. § 1021(b), sets forth the administrator's obligation to file "in accordance with" section 104(a), *id.* § 1024(a), various documents with the Secretary of Labor that are "described," "required," or "referred to" elsewhere in the statute.

20. The specific provisions explaining what is to be disclosed and reported as generally set forth in section 101 also refer to section 104(b) as governing the method of disclosure. *See* sections 102(a)(1) and 103(a)(1)(A), 29 U.S.C. §§ 1022(a)(1) and § 1023(a)(1)(A).

21. Even the provisions referred to in subsections (1) and (2) of section 101(a) do not maintain a bright line between automatic disclosures and disclosures upon request. As one of Bruch's amici recognizes (*see* AARP Brief at 18 n.20), subsection (2) refers, *inter alia*, to the individualized benefit statement described in section 105(a), 29 U.S.C. § 1025(a), which under that provision is available only upon request. Moreover, subsection (1) refers only to the summary plan description described in section 102(a)(1), *id.* § 1022(a)(1), and not to the material modifications and changes described in section 102(a)(1) that under section 104(b)(1) must also be disclosed automatically.

22. Section 104(b), entitled "Publication of summary plan description and annual report to participants and beneficiaries of plan," states that publication "shall be made to participants and beneficiaries of the particular plan as follows" and goes on to make the four disclosure obligations that follow (only two of which are automatic) run to "each" or "any" participant without regard to whether he is "covered under the plan."

congressional intent to broaden the group of people to whom a plan administrator's disclosure obligations ran under WPPDA. (*See* Bruch Brief at 41-42; DOL Brief at 26 & n.25) They never even argue that WPPDA's disclosure requirements applied only to a subclass of participants that could have been broadened. Moreover, their main contention, that ERISA did broaden this subclass to include all participants, is based on a mischaracterization of the small wording changes that were made from WPPDA to ERISA.[23]

In fact, the changes suggest that the phrase "covered under the plan" upon which Bruch and his amici place so much weight, like many other phrases that appear in WPPDA and ERISA, is merely intended to clarify that an administrator's disclosure obligations run only to participants in the specific plan he is administering.[24] These minor (and unexplained) modifications certainly provide no basis for finding a congressional intent to apply the new automatic disclosure requirements added in ERISA to a smaller group than the non-automatic disclosure requirements retained from WPPDA.

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23. Section 5(a) of WPPDA, the predecessor of section 101(a) of ERISA, set forth the plan administrator's obligation to publish "in accordance with section 8" a plan description and annual report "to each participant or beneficiary covered thereunder." 29 U.S.C. § 304(a) (1958), *repealed by* 29 U.S.C. § 1031(a)(1). Section 8(a) of WPPDA, the predecessor of section 104(b) of ERISA, provided that publication was to be made "to the participants and to the beneficiaries covered by the particular plan." 29 U.S.C. § 307(a) (1958), *repealed by* 29 U.S.C. § 1031(a)(1). The phrase "covered thereunder" in section 5(a) of WPPDA became "covered under the plan" in section 101(a) of ERISA (*see* 29 U.S.C. § 1021(a)), and the phrase "covered by the particular plan" in section 8(a) of WPPDA became "of the particular plan" in section 104(b) of ERISA (*see id.* § 1024(b)).

24. Section 9(a) of WPPDA, the predecessor of section 502(c) of ERISA, permitted a damage award if a plan administrator failed or refused to disclose documents to "a participant or beneficiary covered by such plan." 29 U.S.C. § 308(a) (1958), *repealed by* 29 U.S.C. § 1031(a)(1). The fact that the phrase "covered by such plan" does not appear in section 502(c) (*see* 29 U.S.C. § 1132(c)) is of no significance not only for the reasons stated in text, but because this provision is merely a means of enforcing substantive rights defined elsewhere in the statute.

Bruch is incorrect in intimating that Congress found WPPDA's disclosure provisions "inadequate" with respect to the size of the group to whom disclosure was to be made. (*See* Bruch Brief at 41; *see also* DOL Brief at 26 & n.25) The major reports on ERISA explicitly stated that what was "insufficient" under WPPDA was "the limited data available," and changes were made "to increase the information and data required in the reports both in scope and detail."[25] Significantly, when the Conference Committee described the disclosure obligations of ERISA, it noted their applicability to "each participant" and to "participants" interchangeably for automatic and non-automatic disclosures.[26] Indeed, there is not a single reference in the legislative history that indicates any congressional understanding of a distinction between "participants" and "participants covered under the plan" as affecting the statutory distinction between automatic disclosures and disclosures upon request.

Despite the lack of support for these distinctions in either the language or history of the statute, the Department of Labor has promulgated a regulation, 29 C.F.R. § 2510.3-3(d)(2), which defines the term "participant covered under the plan" in a way that it admits does not cover the respondents in this case. (*See* DOL Brief at 28-29) Bruch and the Department ask this Court to defer to the explanatory preamble to the regulation, which notes that it was intended to limit the burden of ERISA's automatic disclosure obligations and states that disclosures upon request are due to any "participant," a term which the preamble does not define but which it construes to include "many individuals whose interest in an employee

25. H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4648, *and in* 2 *Legislative History* 2348, 2358; S. Rep. No. 127, 93d Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4863, *and in* 1 *Legislative History* 587, 613.

26. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 258-59 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5041, *and in* 3 *Legislative History* 4277, 4525-26.

benefit plan is minimal." 40 Fed. Reg. 24,642, 24,649 (1975). (*See* Bruch Brief at 39; DOL Brief at 29)[27]

No deference is due to vague discussions in a regulatory preamble that fail to "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *see K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 556 (1979). Even if ERISA were arguably ambiguous, its language and history so firmly support the conclusion that respondents were not "participants" when they requested information that the preamble has no "power to persuade." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). Under any analysis, therefore, this Court should not defer to the Department's view.

27. Interestingly, the Department defined "participant" in 29 C.F.R. § 2610.2 without hinting at the expansive interpretation it now urges.

CONCLUSION

For the reasons detailed above and in Firestone's opening brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to reinstate the decision of the district court on the two questions presented.

Respectfully submitted,

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(14)

No. 87-1054

In the Supreme Court of the United States

OCTOBER TERM, 1988

FIRESTONE TIRE AND RUBBER COMPANY, ET AL., PETITIONERS

v.

RICHARD BRUCH, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that in reviewing denials of benefits under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B), a court should interpret the terms of the relevant employee benefit plan without deference to the employer's construction in cases involving unfunded plans administered by employers.

2. Whether former employees are entitled to obtain information about employee benefit plans maintained by their former employer pursuant to Section 104(b)(4) of ERISA, 29 U.S.C. 1024(b)(4).

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INTEREST OF THE UNITED STATES

The Secretary of Labor, along with participants and beneficiaries of employee benefit plans, enforces the fiduciary standards and the reporting and disclosure requirements imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. IV) 1001 *et seq.* 29 U.S.C. 1132(a). This case requires the Court to determine, first, the appropriate standard of judicial review of benefit determinations made by ERISA fiduciaries and, second, who is entitled to obtain information about a plan covered by the statute. Because these issues implicate the Secretary's ability to ensure fair and impartial plan administration and compliance with ERISA's requirements, the Secretary has a substantial interest in this case.

STATEMENT

1. In November 1980, petitioner Firestone Tire & Rubber Company sold five of its plants, together comprising its Plastics Division, to the Occidental Petroleum Corporation's Hooker Chemical Division. Occidental acquired the five plants as going concerns, and most of the approximately 500 salaried employees at those plants continued in their same positions as Occidental employees, without interruption and at the same rates of pay.[1] Pet. App. A4, A45. Construing its termination pay plan, which provided severance pay to employees out of Firestone's general assets rather than from a separate fund, Firestone denied severance pay to the employees who transferred to Occidental. It reasoned that no "reduction in work force" (which triggered severance pay under Firestone's plan) occurred when the Plastics Division was sold as an ongoing operation. *Id.* at A4, A26-A27, A48.[2] In addition, some of Firestone's former employees requested but were denied information concerning Firestone's employee benefit plans on the ground that they were no longer participants in the plans (*id.* at A5, A71).

2. Six former Firestone (now Occidental) employees filed this class action in the United States District Court for the Eastern District of Pennsylvania, alleging that Firestone improperly withheld severance pay due under the termination pay plan (Pet. App. A4, A45-A46).[3] Three

[1] There is an unresolved disagreement as to whether the benefits provided by Occidental are comparable to the benefits provided by Firestone (Pet. App. A30).

[2] Unaware that its termination pay plan was governed by ERISA, Firestone did not have in place a formal "claims procedure" as mandated by 29 U.S.C. 1133, and did not comply with the Act's reporting and disclosure requirements (Pet. App. A26).

[3] The plaintiffs also asserted claims with respect to Firestone's vacation, retirement, and stock purchase plans, which have been resolved (Pet. App. A5-A6 n.2, A46).

of the named plaintiffs also alleged that Firestone's administrators unlawfully failed to disclose benefit plan information upon request (*id.* at A3, A5, A39, A46, A69). The suits were brought pursuant to Section 502(a)(1) of ERISA, 29 U.S.C. 1132(a)(1), which provides that a participant or beneficiary of an employee benefit plan may bring a civil action "(A) for the relief provided for in subsection (c) of this section," which provides a penalty of up to $100 a day for failure to provide requested information, and "(B) to recover benefits due to him under the terms of his plan."

The district court granted Firestone's motion for summary judgment (Pet. App. A45-A73). The court limited its review of the denial of termination benefits "to determining whether the administrator's actions were arbitrary and capricious" (*id.* at A47), and concluded that Firestone's decision not to pay termination benefits satisfied this test (*id.* at A56). The district court also denied the named plaintiffs' claims that Firestone had improperly refused to provide the information they had requested (Pet. App. A70-A72). It recognized that "Section 104(b)(4) of ERISA, 29 U.S.C. § 1024(b)(4), imposes a duty on a plan administrator to respond to written requests for information about the plan" (*id.* A70). But, the court noted, under Section 104(b)(4) the plaintiffs were entitled to information only if they were participating in the plan, and a "participant" is "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan" (29 U.S.C. 1002(7)). The court concluded that the three employees were not participants because they did not work for Firestone at the time that they requested the information and were not entitled to benefits (Pet. App. A71-A72).

3. The court of appeals reversed on both issues, and remanded for further proceedings (Pet. App. A1-A44). It concluded that Firestone's decisions that the terms of its termination pay plan did not require it to pay benefits to

its former employees should not be reviewed under the arbitrary and capricious standard, but rather should be reviewed de novo by the court.[4] Acknowledging that most courts have reviewed ERISA benefit determinations under the limited arbitrary and capricious standard (*id.* at A8-A9), the court noted that some courts actually applied a more rigorous test (though retaining the "arbitrary and capricious" label) when the plan administrator possessed an interest adverse to the benefit claimants (*id.* at A11-A13).

The court of appeals also observed that the arbitrary and capricious review standard derived from cases involving employee benefit trusts established under Section 302(c)(5) of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 186(c)(5), which in turn followed common-law trust principles (Pet. App. A14-A21). The court found those precedents inapposite because trust law limits judicial review of trustee actions only if no conflict of interest or improper motive exists and because the LMRA more concretely assures impartial administration by requiring equal numbers of labor and management trustees to manage employee benefit plans (*id.* at A15, A21). By contrast, the Firestone termination pay plan was both unfunded and wholly controlled by company nominees (*id.* at A21), so that "every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket" (*id.* at A22). In those circumstances, the court concluded "that both common sense and the principles of trust law" precluded application of a "presumption that the plan administrator was impartial" (*id.* at A24).

Since the benefits were part of the bargain in return for which employees provided their services to Firestone, the court concluded that Firestone's decision not to pay termi-

[4] The court also rejected the former employees' contention that ambiguous plan terms should be construed strictly against the employer and in favor of plan beneficiaries (*id.* at A3, A24-A25). It thus concluded that "there should be deference to neither the plan administrator's nor the participants' construction of plan terminology" (*id.* at A3).

nation benefits should be reviewed under "the principles governing construction of contracts between parties bargaining at arms' length" (*id.* at A25). Under that approach, the court explained, a reviewing court should utilize the traditional rules of contract interpretation to determine, from common trade usage, past practice under the benefit plan at issue, and other relevant evidence, the contracting parties' intention as to the issue at hand and, if that intention is not discernible, "the court should adopt the most reasonable understanding of the term' (*id.* at A28-A31 (footnote omitted)). Because the district court had not approached the question in that way,[5] but had instead deferred to Firestone's interpretation, the court of appeals remanded.

The Third Circuit also rejected the district court's conclusion that respondents were not "participants" entitled to request benefit plan information and recover damages for nondisclosure (Pet. App. A39-A43). The court observed that limiting participant status to persons presently covered by a plan or actually entitled to benefits equates standing to claim benefits with ultimate entitlement to receive those benefits (*id.* at A41). Such an interpretation, in the court's opinion, conflicts with Congress's intent to provide claimants with enough information "to make their own decisions on how best to enforce their rights" (*id.* at A43). The court therefore concluded that the right to request and receive information about an employee benefit plan "most sensibly extend[s] both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not" (*id.* at A42).

[5] The court of appeals noted, in particular, that it was not clear whether common trade practice favored Firestone's interpretation or that of its former employees, that the parties disputed what Firestone's past practice had been and what it had previously told employees, and that the district court had not determined whether there was a significant difference in the employees' compensation from Occidental (Pet. App. A30).

SUMMARY OF ARGUMENT

I. Congress in ERISA did not specify the standard of review in benefit claims disputes, but instead directed the federal courts to develop a body of federal common law governing those claims. In a case involving an unfunded employee benefit plan administered by the employer, the objectives of the statute are best served by resolving questions of plan interpretation under established principles of contract interpretation, rather than by affirming decisions of the employer-administrator unless arbitrary and capricious. That approach comports with two of ERISA's primary objectives—insulating benefit decisions from the self-interest of employers and ensuring that employees who qualify for benefits actually receive them.

Where benefits are paid out of the employer's general assets, it is unfair to employees to defer to the employer's interpretation of the terms of the plan. Firestone, like the courts that have reviewed employers' decisions under the arbitrary and capricious standard, nevertheless contends that it is appropriate to borrow common law trust rules, as was done in cases involving LMRA trusts, and defer to its interpretation even though it is biased. Trust analogies are plainly inapposite here, however, since Firestone established no separate body of trust assets to pay severance benefits, and the common law of trusts does not support application of the arbitrary and capricious standard to administrators' decisions in that instance. ERISA's own reliance on trust principles is selective, and in no way suggests that Congress intended that a highly deferential standard be applied here. Cases arising under Section 302(c)(5) of the LMRA are doubly inapposite, since, besides the presence of a trust in those cases, the LMRA mandates impartial administrators.

Firestone's arguments that ERISA itself compels review under the arbitrary and capricious standard are wholly without merit. Nothing in ERISA grants administrators

complete discretion in making benefits decisions. Furthermore, review under the arbitrary and capricious standard in cases involving unfunded plans administered by employers would be ironic in that employees would be worse off than they were before ERISA was enacted.

Nor is it appropriate to apply a "flexible" arbitrary and capricious standard, whose rigor varies on an ad hoc basis with the appearance of bias on the part of the administrator. That approach would only create confusion as to the proper standard of review. Since there is no good reason to defer to an employer's construction of the terms of an employee benefit plan when it is paying benefits out of its own pocket, this Court should not endorse the arbitrary and capricious standard at all in cases involving unfunded plans administered by employers.

II. The court of appeals also correctly concluded that Firestone should have given the three named plaintiffs the information they requested, since Section 104(b)(4) states that information about employee benefit plans must be provided "upon written request of any participant." The statutory definition of "participant," 29 U.S.C. 1002(7), as including present and former employees who are or may become eligible for benefits, is broadly encompassing. We agree with the court of appeals that it makes sense to read Section 104(b)(4) to allow any employee or former employee who "claims to be" entitled to benefits to obtain information upon request. That construction fulfills Congress's intent in enacting ERISA's disclosure provisions, which are meant to provide access to complete information about the terms of employee benefit plans. In contrast, Firestone's construction—which allows plan administrators to deny access to information based solely on the administrator's determination that the individual is not entitled to benefits—plainly undermines Congress's purpose in enacting the disclosure provisions.

There is no basis for Firestone's contention that a broad construction of "participant" will impose costly burdens

on employee benefit plans. Section 104(b)(4) expressly provides that plan administrators may make a "reasonable charge" for providing information. In addition, the Secretary of Labor has by regulation distinguished between Section 104(b)(4) and ERISA's provisions requiring automatic disclosure of information about employee benefit plans without charge and without request. The Secretary has reasonably determined that plan administrators need not provide such automatic disclosure to former employees whom plan administrators determine to have no vested right to benefits, while also concluding that former employees are entitled under Section 104(b)(4) to certain information upon request.

ARGUMENT

I. BENEFIT DENIALS BY EMPLOYER-CONTROLLED ADMINISTRATORS OF UNFUNDED EMPLOYEE BENEFIT PLANS SHOULD BE REVIEWED WITHOUT DEFERENCE TO THE ADMINISTRATOR'S INTERPRETATION OF THE TERMS OF THE PLAN

A. Congress's Purposes In Enacting ERISA Are Advanced If Unfunded, Employer-Controlled Employee Benefit Plans Are Interpreted As Contracts Bargained At Arms' Length

Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B), authorizes any particpant in or beneficiary of an employee benefit plan covered by the Act to bring a civil action "to recover benefits due to him under the terms of his plan." Although the statute does not specify the applicable standard of review or otherwise set substantive standards for the resolution of disputes over benefits, the Conference Report explained that "[a]ll such actions * * * are to the regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974). This Court, in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957), construed Section 301 to require

the federal courts to "fashion from the policy of our national labor laws" a federal common law governing the interpretation of collective bargaining agreements. We submit, therefore, that the Report's reference to Section 301 of the LMRA, 29 U.S.C. 185, was a direction to the courts to fashion a body of federal common law to govern review of benefit claim denials. Other portions of "ERISA's legislative history indicate[] that * * * 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans' " (*Franchise Tax Bd.* v. *Construction Laborers Vacation Trust,* 463 U.S. 1, 24 n.26 (1983), quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)), and this Court has recognized that federal courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans" (*Pilot Life Ins. Co.* v. *Dedeaux,* No. 85-1043 (Apr. 6, 1987), slip op. 15). Thus, the task of determining the appropriate standard of review in benefit actions under Section 502(a)(1)(B) has been assigned to the courts. This Court's decision should be determined "by looking at the policy of the legislation and fashioning a [standard] that will effectuate that policy" (*Textile Workers Union* v. *Lincoln Mills,* 353 U.S. at 457).

One of Congress's primary goals in enacting ERISA was to assure that every employee who becomes eligible for a benefit under an employee benefit plan "actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.,* 446 U.S. 359, 375 (1980).[6] To that end, the Act

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[6] While *Nachman Corp.* involved a pension plan, ERISA's rules on reporting, disclosure, and fiduciary responsibility, which are designed to ensure that participants receive the benefits they have earned, apply to all "employee benefit plans," including welfare plans as well as pension plans. *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp. Inc.,* 472 U.S. 559, 569 n.9 (1985); 29 U.S.C. (& Supp. IV) 1002(3), 1021-1031, 1101-1114. And Section 502(a)(1)(B) does not distinguish between pension plans and welfare plans in authorizing suits "to recover benefits" due to employees.

imposes on benefit plan fiduciaries, who "control and manage" the plan (29 U.S.C. 1102(a)(1)), strict standards of loyalty and care. *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985). These fiduciary standards include, most notably, a duty to act "solely in the interest of the participants and beneficiaries" for the "exclusive purpose" of paying benefits and defraying administrative costs "in accordance with the documents and instruments governing the plan" (29 U.S.C. 1104(a)(1)). They are intended to "specifically insulate the [plan] from the employer's interest." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 333 (1981).

As the court of appeals concluded, in the context of an unfunded benefit plan administered by the employer, a standard of review that focuses de novo on the terms of the plan best achieves the statutory goals of insulating employee benefit plans from employers' interests and ensuring that employees who become eligible for benefits receive them. Testing the issue in this manner, as one would any matter of contractual interpretation, is also consistent with federal labor policy, under which employee benefits are viewed as " 'wages * * * or other conditions of employment' " to be negotiated in a labor-management contract. See *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 253-254 (7th Cir. 1948) (citation omitted), cert. denied, 336 U.S. 960 (1949) (holding that such benefits are a mandatory subject of collective bargaining under the National Labor Relations Act); see generally *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).[7]

[7] Before ERISA was passed in 1974, employee benefit plans, other than those administered as trusts at common law or under the LMRA, were generally treated as contract obligations on the part of the employer. See, *e.g.*, *Phelps Dodge Corp.* v. *Brown*, 112 Ariz. 179, 540 P.2d 651 (1975); *Frietzsche* v. *First Western Bank & Trust Co.*, 168 Cal. App. 2d 705, 336 P.2d 589 (1959); *Ellis* v. *Emhart Mfg.*, 150 Conn. 50, 191 A.2d 546 (1963); *Sigman* v. *Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 11 N.E.2d 878 (1937); *Strickland* v. *American Bakery & Confectionery Workers Union*, 527 P.2d 10 (Okla. 1974); *Rose City Transit Co.* v. *City of Portland*, 271 Or. 588, 533 P.2d 339 (1975); *Jacoby* v. *Grays Harbor Chair & Mfg.*, 77 Wash. 2d 911, 468 P.2d 666 (1970). Accord *Erich* v. *GAF Corp.*, 110 N.J. 230, 540 A.2d 518, 522 (1988) (observing that the " 'principles of contractual construction' " applied by the Third Circuit in this case are "similar to the standard of review that would be applicable under state law" (citation omitted)). See also Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 910, 916-922 (1970). In such cases, the reviewing court examined the employee's benefit claim as it would any other contract allegation, looking to the terms of the plan and other manifestations of the parties' intent and deciding whether benefits were payable without deferring to either party's construction of the terms of the contract.

Firestone maintains (Br. 25 n.22) that pre-ERISA decisions applied an arbitrary and capricious standard, but many of the cases they cite involved trusts and are therefore inapposite. See *Van Pelt* v. *Berefco, Inc.*, 60 Ill. App. 2d 415, 208 N.E.2d 858 (1965); *Reese* v. *Administrative Comm. of the Profit Sharing Trust*, 218 Cal. App. 2d 646, 32 Cal. Rptr. 818 (1963); *Going* v. *Southern Mill Employees' Trust*, 281 P.2d 762 (Okla. 1955); *Kloman* v. *Doctors Hospital, Inc.*, 76 A.2d 782 (D.C. 1950). While the other cited decisions concerned unfunded plans, the terms of the plans that the courts sought to enforce gave the employers or their handpicked administrators "sole and exclusive" power to determine benefit eligibility; there is no such provision in Firestone's plan, and such a provision would not be enforceable under ERISA (see note 11, *infra*). Moreover, to avoid unconscionable results courts sometimes construed the plans in cases where administrators had unbounded discretionary authority to permit claims that particular benefit denials were unreasonable or in bad faith. See, *e.g.*, *Gitelson* v. *Du Pont*, 17 N.Y.2d 46, 215 N.E.2d 336, 268 N.Y.S.2d 11 (1966); *Garner* v. *Girard Trust Bank*, 442 Pa. 166, 275 A.2d 359 (1971).

It is illogical to assume that the administrator of an unfunded plan whose benefits are paid from the employer's assets will function with the same impartiality as a neutral trustee of a funded plan, since the administrator's employer will sustain a financial loss with every award of

benefits. Despite Firestone's insistence (Br. 31) that self-interest played no role in its denial of respondents' claims, and whether or not it did in this case, the members of this Court need not "close [their] eyes as judges to what [they] must perceive as men." *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920), cert. denied, 256 U.S. 702 (1921). Accordingly, the Court should decide, in exercising its federal common law powers under Section 502(a), to require courts to resolve questions about the meaning of the terms of employee benefit plans without deferring to the employer's construction in such cases.[8]

B. Neither The Common Law Of Trusts Nor Experience With LMRA Trusts Supports The Use Of The Arbitrary And Capricious Standard In This Case

In applying the arbitrary and capricious standard in ERISA benefits cases,[9] the federal courts of appeals have typically relied uncritically on standards developed for reviewing trustee action at common law or in connection with employee benefit funds established under Section 302(c)(5) of the LMRA.[10] By contrast, the court of appeals

[8] Firestone argues (Br. 29) that there should be evidence that a particular decision in fact resulted from bias before the courts question an administrator's interpretation of the terms of a plan. But instances of biased intent may not always be subject to proof. Moreover, the standard of review is the means by which the employer's decision is to be evaluated, not the conclusion to be drawn upon determining that the employer acted improperly.

[9] See, *e.g.*, *Jestings* v. *New England Tel. & Tel. Co.*, 757 F.2d 8 (1st Cir. 1985); *Miles* v. *New York State Teamsters Conference Pension & Retirement Fund,* 698 F.2d 593 (2d Cir.), cert. denied, 464 U.S. 829 (1983); *Rosen* v. *Hotel & Restaurant Employees & Bartenders Union,* 637 F.2d 592 (3d Cir.), cert. denied, 454 U.S. 898 (1981); *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *Dennard* v. *Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982); *Moore* v. *Reynolds Metals Co. Retirement Program for Salaried Employees,* 740 F.2d 454 (6th Cir. 1984), cert. denied, 469 U.S. 1109 (1985); *Pokratz* v. *Jones Dairy Farm,* 771 F.2d 206 (7th Cir. 1985); *Central Hardware Co.* v. *Central States, Southeast & Southwest Areas Pension Fund,* 770 F.2d 106 (8th Cir. 1985), cert. denied, 475 U.S. 1108 (1986); *Dockray* v. *Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986); *Peckham* v. *Board of Trustees,* 653 F.2d 424 (10th Cir. 1981); *Anderson* v. *Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), cert. denied, 474 U.S. 995 (1985); *Maggard* v. *O'Connell,* 671 F.2d 568 (D.C. Cir. 1982).

[10] See, *e.g.*, *Music* v. *Western Conference of Teamsters Pension Trust Fund,* 712 F.2d 413, 418 (9th Cir. 1983); *Dennard* v. *Richards Group, Inc.*, 681 F.2d 306, 313 (5th Cir. 1982); *Wardle* v. *Central States, Southeast & Southwest Areas Pension Fund,* 627 F.2d 820, 824 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981); *Bayles* v. *Central States, Southeast & Southwest Areas Pension Fund,* 602 F.2d 97, 99-100 (5th Cir. 1979); *Bueneman* v. *Central States, Southeast & Southwest Areas Pension Fund,* 572 F.2d 1208, 1209 (8th Cir. 1978); *Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 410 (2d Cir. 1977).

Some recent decisions from other circuits have called into question the appropriateness of the "arbitrary and capricious" standard under ERISA. See, *e.g.*, *Van Boxel* v. *Journal Co. Employees' Pension Trust,* 836 F.2d 1048, 1052 (7th Cir. 1987) (noting that the courts borrowed rules developed in cases involving LMRA trusts "apparently without the courts' noticing that employers often held the whip hand in ERISA trusts," and that "[t]ransposed to the ERISA setting, the arbitrary and capricious standard may be inapt, a historical mistake, or a mechanical application from different settings"); *Shull* v. *State Machinery Co. Employees Profit Sharing Plan,* 836 F.2d 306, 307 (7th Cir. 1987) (noting "a growing restiveness in cases where the trustees seem not to be true neutrals in the disputes they are called on to resolve"); *Varhola* v. *Doe,* 820 F.2d 809, 813 (6th Cir. 1987) ("[w]ere we writing on a clean slate, we might well be persuaded that [a] stricter standard of review should apply"). And at least one appellate decision has left open the possibility of a different standard of review when an administrator's overall actions display hostility to the statutory scheme. *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984) ("[w]e do not decide that [the arbitrary and capricious standard] is the only applicable standard of review when ERISA's provisions have been flouted in such a wholesale and flagrant manner"), cert. denied, 474 U.S. 865 (1985). Notwithstanding this questioning, none of these courts has actually abandoned the arbitrary and capricious standard,

in this case, for the first time, evaluated the theoretical and practical underpinnings of the arbitrary and capricious standard in light of the statutory objectives. As the court concluded, that standard has no place in actions brought to recover benefits under unfunded, employer-administered plans. Neither the rationales of earlier courts nor petitioners' arguments justify a standard according deference to the employer's construction of the terms of a plan in such circumstances.

The trust analogies on which other courts and Firestone so heavily rely (Br. 11-12) are wholly inapt to an unfunded benefit plan.[11] To begin with, there is no historical reason

finding the issue too "well-settled" in precedent. See, *e.g.*, *Varhola*, 820 F.2d at 813; *Jung* v. *FMC Corp.*, 755 F.2d 708, 711 (9th Cir. 1985).

[11] Petitioners' basic assumption (Br. 12, 28-29) that traditional trust law principles always require judicial deference to a trustee's interpretation of trust terms is not well founded. While trust principles make a deferential standard appropriate for review of a trustee's exercise of discretionary powers (Restatement (Second) of Trusts (1959) § 187; G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 560 at 193-208 (rev. 2d ed. 1980) [hereinafter Bogert]), the trustee has only those powers, discretionary or otherwise, that the trust instrument or operation of law confers (Restatement §§ 186, 187 comment *a*; Bogert § 551). Ordinarily, the courts interpret trust instruments "in the light of all the circumstances and such other evidence of the intention of the settlor * * * as is not inadmissible" (Restatement § 4 comment *d*; Bogert § 182 at 255). Although a particular trustee may be granted power to construe disputed or doubtful terms, and such interpretations will not be disturbed if reasonable (Bogert § 559 at 169-171), a trustee lacking such authority may be obliged to seek judicial instructions to avoid committing a breach of trust (*id.* at 162-168; Restatement § 201 comment *b*). And, as the court of appeals noted (Pet. App. A15, citing Restatement § 187, comment *g*), even where a matter has been committed to a trustee's discretion, a court will not defer to the trustee's judgment if it appears that the trustee's decision resulted from bias.

In any event, language in a plan document purporting to give biased administrators unbounded discretion to decide what the terms of a plan mean (and there appears to be no such language in Firestone's

to apply a trust-law standard to a plan like Firestone's because it is obviously *not* a trust since no source of benefit payments exists separately from the employer's own operating funds. See, *e.g.*, *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1214 (8th Cir.) ("[f]unding implies the existence of a *res* separate from the ordinary assets of the corporation"), cert. denied, 454 U.S. 968 and 1084 (1981). As a result, there is no identifiable and segregated trust property and, perforce, no trustee with both legal title and an equitable duty to deal with such property for the benefit of others. Without these incidents, a trust relationship does not exist. Restatement (Second) of Trusts (1959) § 2; Bogert, *supra* note 11, §§ 1, 111. The unfunded plan sponsor has only a contractual obligation to pay benefits from any available source. See Restatement §§ 13, 74 comment *a*; Bogert § 17.[12] An employer

termination pay plan) would not be enforceable under ERISA. Exculpatory language in plan documents "purport[ing] to relieve a fiduciary from responsibility or liability" is expressly "void as against public policy" (29 U.S.C. 1110(a)). Similarly, language granting biased administrators unfettered discretion to determine who would receive benefits would be in tension with ERISA's judicial review and disclosure provisions. The disclosure provisions are designed so that a plan participant will know "exactly where he stands" (S. Rep. 93-127, 93d Cong., 1st Sess. 27 (1973); H.R. Rep. 93-533, 93d Cong., 1st Sess. 11 (1973)), and participants cannot really know where they stand if biased administrators have discretionary authority, to which courts must defer, to construe plan terms.

[12] Firestone's reliance (Br. 12 & n.9) on Section 403(a) of ERISA, 29 U.S.C. 1103(a), to blur the distinction between funded and unfunded plans is misplaced. Although that section provides that the assets of employee benefit plans "shall be held *in trust* by one or more trustees," the provision assumes that a particular plan *has* assets. Where the plan benefits are payable (as in the case of Firestone's severance pay plan) from the sponsoring employer's own general assets, no "plan assets" exist. See 44 Fed. Reg. 50363, 50365 (1979) (preamble to proposed regulations relating to definition of plan assets and to establishment of trust). Accordingly, ERISA has imposed no "trust" on the source of Firestone's severance pay benefits.

who has set up a segregated fund devoted exclusively to the payment of benefits feels no direct effect from each specific benefit payment decision, whereas unfunded plans draw their benefits, dollar for dollar, from the employer's funds.[13] Only the existence of a distinct trust fund tangibly insulates the benefits decisions of a plan administrator who is controlled by the employer from the employer's ordinary business decisions.[14]

The loose standard of review is also inappropriate because the absence of a separate, identified source of benefits fundamentally alters the trustee's task under a funded plan of "provid[ing] benefits to as many intended employees as is economically possible while protecting the financial stability of the [plan]." See *Elser* v. *IAM National Pension Fund,* 684 F.2d 648, 656 (9th Cir. 1982), cert. denied, 464 U.S. 813 (1983). Unlike a funded plan's trustee, whose decision must "balance[] the interests of present claimants against the interests of future claimants" (see *Struble* v. *New Jersey Brewery Employees' Welfare*

[13] Establishment of a trust also imposes on the plan administrator a duty to preserve and protect that benefit fund for the special purposes of the trust. See Restatement § 176; Bogert § 582. ERISA's requirement that all plan administrators act "solely in the interest of the participants and beneficiaries" (29 U.S.C. 1104(a)(1)) does not require the administrator of an unfunded plan to devote any part of the employer's moneys exclusively to the payment of benefits. Also, the statute's prohibition against inurement of plan assets to the employer's benefit (29 U.S.C. 1103(c)(1)), and the prohibitions against certain conflict-of-interest transactions involving the plan and its assets (29 U.S.C. 1106, 1107), have no meaning if a plan does not acquire or hold any assets.

[14] If an employer has seriously underfunded a benefit trust, or a particular interpretation of the plan could require the employer to make additional contributions, a trustee subject to control by the employer might not have adequate insulation from the employer's financial interest. The proper standard of review in such a situation is not presented by this case, however.

Trust Fund, 732 F.2d 325, 333 (3d Cir. 1984)),[15] the administrator of an unfunded plan necessarily chooses between the interests of individual plan beneficiaries on the one hand and the employer's desire to hold down business expenses on the other. This latter choice has little in common with an unbiased trustee's making of tradeoffs between various interests of different plan beneficiaries.[16]

Although Congress in enacting ERISA manifested an intent to "codif[y] and make[] applicable * * * *certain* principles developed in the evolution of the law of trusts" (emphasis added), ERISA's drafters also understood that ordinary trust principles are often "insufficient to adequately protect the interests of plan participants and beneficiaries." S. Rep. 93-127, 93d Cong., 1st Sess. 29 (1973); H.R. Rep. 93-533, 93d Cong., 1st Sess. 11-12 (1973).[17] Recognizing that employee benefit plans,

[15] See also *Adams* v. *New Jersey Brewery Employees' Pension Trust Fund,* 670 F.2d 387, 397 (3d Cir. 1982) ("[p]artly because of these conflicting obligations, trustees are given broad discretion to act"); *Rueda* v. *Seafarers International Union,* 576 F.2d 939, 942 (1st Cir. 1978) ("we review for arbitrariness in light of the trustees' responsibility to all potential beneficiaries").

[16] In cases challenging the apparently self-serving decisions of employer-fiduciaries on non-benefit issues, the courts have accorded those decisions no deference, considering de novo whether the fiduciaries' actions violated ERISA's strict standard of fiduciary loyalty to plan participants and beneficiaries. *E.g., Struble* v. *New Jersey Brewery Employees' Welfare Trust Fund,* 732 F.2d at 333 (employer-appointed trustees vote to give refunded health insurance premiums to the employers so as to reduce their future contributions to the plan); *Donovan* v. *Cunningham,* 716 F.2d 1455 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (corporate directors serving as plan administrators purchase corporation stock for more than adequate consideration); *Donovan* v. *Bierwirth,* 680 F.2d 263 (2d Cir.), cert. denied, 459 U.S. 1069 (1982) (corporate officers serving as plan trustees reject, during a takeover bid, a tender offer for corporation stock held by the plan but instead purchase more stock).

[17] Firestone also notes (Br. 17-19) that the legislative histories of the LMRA and the Welfare and Pension Plans Disclosure Act (WPPDA) exhibit congressional reliance on traditional fiduciary principles to

covering hundreds or thousands of participants, are "quite different from the [customary private] trust both in purpose and in nature," the drafters expected the courts to interpret fiduciary principles "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act" (*ibid.*). Thus, Congress contemplated only selective adoption of trust rules "with modifications appropriate for employee benefit plans" (*id.* at 13).

Judicial experience with employee benefit trusts under Section 302(c)(5) of the LMRA is also totally inapposite. First, LMRA plans are necessarily cast in "trust" form, thus insulating sponsoring employers from the cost of each benefit payment. Second, such trusts are managed not by employer nominees, but by a board consisting of equal numbers of labor and management representatives with an impartial umpire to decide matters when the two trustee groups are deadlocked. See *NLRB* v. *Amax Coal Co.*, 453 U.S. at 328-329. These structural arrangements provide participants in LMRA plans with tangible and realistic guarantees against biased decisionmaking that are totally absent in the case of an unfunded, employer-administered ERISA plan.

C. ERISA Itself Does Not Mandate Deference To An Employer's Interpretation Of The Terms Of An Unfunded Employee Benefit Plan

Firestone claims (Br. 9-11, 15-17) that the conferral of decision-making authority on plan fiduciaries, and Congress's rejection of proposals to impose federal agency review and arbitration procedures as limits on that authority, require deferential judicial review of the meaning of employee benefit plans in reviewing benefit denials pursuant to Section 502(a)(1)(B).[18] Firestone argues from Section 402(a) of ERISA, 29 U.S.C. 1102(a), stating that a plan must list "one or more named fiduciaries who * * * shall have authority to control and manage the operation and administration of the plan," and from 29 U.S.C. 1002(21), stating that "a person is a fiduciary with respect to a plan to the extent * * * he exercises any discretionary authority," for the proposition that administrators of employee benefit plans have discretionary authority to make benefit decisions. It does not follow, however, that because persons exercising discretionary authority are fiduciaries, fiduciaries always exercise discretion. ERISA did not grant administrators unbounded discretionary authority over benefits decisions, but rather sought to make them substantially accountable for their decisions.

safeguard employee benefit plans. This is irrelevant, however, because ERISA's drafters thought those statutes inadequate in important respects. See S. Rep. 93-127 at 4 (the LMRA was "not intended to establish nor does it provide standards for * * * fiduciary conduct," and the WPPDA was "wholly lacking in substantive fiduciary standards"); H.R. Rep. 93-533 at 4 (same). Indeed, ERISA's drafters viewed the Act as a "major departure" from existing law. H.R. Rep. 93-533 at 3; see also S. Rep. 93-127 at 35 (ERISA "remove[s] jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities"); H.R. Rep. 93-533 at 17 (same).

[18] Firestone further contends (Br. 19-20) that Congress's failure, in 1982, to enact legislation to require de novo review in all ERISA benefit cases somehow demonstrates its adherence to the arbitrary and capricious standard. This overlooks the well-established rule that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Mackey* v. *Lanier Collections Agency & Service, Inc.*, No. 86-1387 (June 17, 1988), slip op. 13 (citation omitted); *United States* v. *Price*, 361 U.S. 304, 313 (1960). See also *Pierce* v. *Underwood*, No. 86-1512 (June 27, 1988), slip op. 13 ("it is the function of the courts and not the Legislature * * * to say what an enacted statute means"). Indeed, since the bill in question was never even reported from the committee, its failure is an even less reliable indicator of Congress's views. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 n.11 (1969); *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950).

To whatever extent the failure to enact an across-the-board de novo review standard may be deemed relevant, it does not suggest that Congress then viewed such a standard as always inappropriate. It is just as plausible to assume that Congress was not persuaded to impose a single standard of review applicable in all cases, but instead left the matter for common law development by the courts, and that the committee failed to report the bill for that reason.

Section 402(a)(1) provides: "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." The Conference Report explained the purpose of Section 402(a) by stating that "[a] written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan" and that fiduciaries must be named "so the employees may know who is responsible for operating the plan" (H.R. Conf. Rep. 93-1280 at 297).

As noted above (note 7, *supra*), pre-ERISA courts generally reviewed benefit decisions under contract principles. Given ERISA's fundamental goal of correcting "the abuses and shortcomings * * * found to exist in the private [employee benefit] system" (120 Cong. Rec. 29928 (1974) (remarks of Sen. Williams)), it would be ironic indeed to construe its adoption of fiduciary standards to somehow diminish the accountability that already existed for employers operating unfunded employee benefit plans. Thus, the overall purposes of the Act are better served by permitting reviewing courts to apply contract principles in determining, under Section 502(a)(1)(B), whether "benefits are due * * * under the terms of the plan."[19]

[19] We would caution, however, against applying contract principles that might undermine other statutory objectives. For example, the plaintiffs have argued that employer-drafted benefit plans should be treated as contracts of adhesion, with ambiguities construed strictly against the drafter. Although this rule finds some support in pre-ERISA case law (see, *e.g.*, *Frietzsche*, 168 Cal. App. 2d at 706-707, 336 P.2d at 590; *Sigman*, 57 Ohio App. at 5-7, 11 N.E.2d at 879), the Third Circuit's treatment of the unfunded plan as a contract negotiated at arms' length adequately protects benefit rights, while at the same time avoiding an incentive to litigation that could exhaust plan resources and, indeed, defeat ERISA's intent to encourage the establishment of employee benefit plans. That approach is also consistent with national labor policy, which, as noted (page 10, *supra*), views employee benefits as mandatory subjects of collective bargaining and establishes a framework for arms'-length negotiation between employers and employees.

D. A "Flexible" Arbitrary And Capricious Standard Is Not A Viable Alternative To De Novo Review Of Benefit Decisions Made By Biased Administrators Of Unfunded Plans

Firestone contends (Br. 30-32) that a "flexible" arbitrary and capricious standard provides adequate protection against improprieties in plan administration. They rely on Seventh and Ninth Circuit decisions in which those courts, while adhering to the arbitrary and capricious rubric, have permitted more searching review when there is reason to suspect partiality in plan benefit determinations.[20] These cases suggest "[t]he existence of a sliding scale in judicial review of ERISA trustees' decisions * * * [that] give[s] less deference to a decision the more the trustees' impartiality can fairly be questioned" (*Van Boxel* v. *Journal Co. Employees' Pension Trust,* 836 F.2d 1048, 1053 (7th Cir. 1987)). By expanding the judicial inquiry in the face of obvious "danger signals," this more elastic standard seeks to avoid the more absurd results that may occur if the decisions of blatantly biased administrators are examined under the arbitrary and capricious standard. See, *e.g.*, *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985) (employer's denial of benefits "made in the course of, and could have been infected by," its flagrant and wholesale violations of ERISA).

At the outset, it is unclear what is meant by a "flexible" arbitrary and capricious standard, if it is not the imposi-

[20] See, *e.g.*, *Van Boxel*, 836 F.2d at 1053 ("careful judicial scrutiny" appropriate when company-appointed trustees denied a pension claim that was predicated on the claimant's years of work for an adversary union); *Dockray* v. *Phelps Dodge Corp.*, 801 F.2d at 1152 (less deference due to a company administrator's denial of benefits to employees involved in a long and unusually bitter strike against the company); *Jung* v. *FMC Corp.*, 755 F.2d at 711-712 (employer's denial of severance pay to the salaried employees of a former division is entitled to "less deference" because it "avoids a very substantial outlay"). See also *Maggard* v. *O'Connell*, 671 F.2d 568, 571-572 (D.C. Cir. 1982) (judicial review of benefit denial requires a "stern hand and flinty eye" when there are " 'danger signals' rebutting 'the presumption of agency regularity' ").

tion of a more rigorous standard of review—in the manner of the court below—based on existing conflicts of interest. The Seventh Circuit's formulation allows the reviewing court to eliminate deference altogether in some cases. *Van Boxel* v. *Journal Co. Employees' Pension Trust,* 836 F.2d at 1052-1053 (when trustees "have a serious conflict of interest, the proper deference to give their decisions may be slight, even zero," and the court will interpret the plan documents for itself). The Ninth Circuit accords "less deference" when the circumstances of the benefit decision impose a significant conflict of interest on the plan administrator. *Dockray* v. *Phelps Dodge Corp.,* 801 F.2d 1149, 1152 (1986); *Jung* v. *FMC Corp.,* 755 F.2d 708, 711-712 (1985). Since the propriety of the decision is the issue to which the standard of review must be applied, it must be the appearance of such a conflict of interest rather than the conclusion that a decision resulted from bias that triggers closer judicial scrutiny. And any presumption of correctness to benefit decisions made in the face of a disincentive to paying benefits runs the risk of upholding decisions in which the interests of plan participants and beneficiaries were sacrificed to the employer's self-interest.

The inherent nature of the conflict faced by the employer-administrators of unfunded plans entails an unqualified rule of no deference in cases involving unfunded plans administered by employers. Any alternative would sow confusion in the courts and foster inconsistent enforcement of benefit rights under these plans; principles of contract interpretation are a well-established and clearly-developed body of law.[21]

[21] Firestone suggests (Br. 27 n.26) that use of a contract standard of review would conflict with appellate decisions holding that a jury trial is not available in ERISA benefit actions. The two issues, however, are not directly linked. While some courts have observed that a jury trial may be incompatible with the application of trust principles under ERISA, and with the arbitrary and capricious standard in particular (see *Berry* v. *Ciba-Geigy Corp.,* 761 F.2d at 1006-1007 (4th Cir.); *In re Vorpahl,* 695 F.2d 318, 321 (8th Cir. 1982); *Calamia* v. *Spivey,* 632 F.2d 1235, 1237 (5th Cir. 1980); *Wardle,* 627 F.2d at 829-830 (7th Cir.)), the principal focus of the jury trial decisions has been on the equitable nature of the *relief* sought, not the standard of review involved (see, *e.g., Katsaros* v. *Cody,* 744 F.2d 270, 278 (2d Cir.), cert. denied, 469 U.S. 1072 (1984) ("plaintiffs seek equitable relief in the form of removal and restitution as distinguished from damages for wrongdoing or non-payment of benefits")). In addition, some courts have suggested that a *legal* remedy (with a right to jury trial) may exist even under trust law when the trustee has an immediate and unconditional obligation to pay all the claimed benefits. See *In re Vorpahl,* 695 F.2d at 322 n.6; *Wardle,* 627 F.2d at 829 (both citing Restatement (Second) of Trusts § 198(1)). Whether a jury trial is available in a benefit denial case is not a question presented here.

II. FORMER EMPLOYEES WHO WERE PLAN PARTICIPANTS ARE ENTITLED TO OBTAIN COPIES OF PLAN DOCUMENTS UPON REQUEST

The court of appeals also reached the correct result when it held that Firestone should have provided information about its employee benefit plans to the three named plaintiffs upon request, pursuant to Section 104(b)(4) of ERISA, 29 U.S.C. 1024(b)(4). That provision states that "upon written request of any participant," the plan administrator shall furnish various specified information, including, among other items, the plan description, the latest annual report, and "instruments under which the plan is established or operated."[22] Firestone refused to provide information about its termination pay plan to two of the named plaintiffs, Smolinski and Schade, on the ground that they were no longer Firestone employees when they requested the information and hence were not "participants" in that plan. Similarly, Firestone denied Bruch's request for information about its stock purchase plan on the ground that it

[22] Section 104(b)(4) provides: "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence."

had paid him his vested interest in the plan and his unvested interests were forfeited when Occidental purchased the Plastics Division and he went to work for it. Pet. App. A71-A72.

Section 3(7), 29 U.S.C. 1002(7), broadly defines "participant" as "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." Contrary to Firestone (Br. 34-37), this language does not limit participant status to individuals who have a vested interest in the plan or whose employment status assures them of future benefits. Firestone confuses participation in a plan with entitlement to benefits. Moreover, the statutory definition specifically includes individuals who "may become eligible" for benefits. And employees presently covered by a plan are plainly participants even if they have no legal right to benefits until their interest vests or the specified contingency for benefit payment actually occurs.

Congress's inclusion of present and former employees who are or may become eligible for benefits[23] was an effort

[23] There is no basis in the language of Section 3(7) for the Fifth Circuit's conclusion that "the 'may become eligible' language was intended to apply only to current employees" (*Nugent* v. *Jesuit High School*, 625 F.2d 1285, 1287 (1980); see *Jackson* v. *Sears, Roebuck & Co.*, 648 F.2d 225, 228 (1981)), a position Firestone endorses (Br. 33 n.30). Since the statute provides that "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit" is a "participant," it is plain that the phrase "may become eligible," which is separated by 19 words (including "former employee") from the word "employee," does not relate only to the word "employee."

The Second and Ninth Circuits have taken the position that a former employee remains a "participant" if he "may become eligible" for benefits as a result of returning to covered employment in the future. See *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (9th Cir.), cert. denied, 479 U.S. 916 (1986); *Saladino* v. *ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985); *Weiss* v. *Sheet Metal Workers Local No. 544 Pension Trust*, 719 F.2d 302, 304 (9th Cir. 1983), cert. denied, 466 U.S. 972 (1984). Those courts, however, require that the former employee demonstrate a "reasonable expectation" or "significant probability" of returning to work under the plan. That additional burden is not sensible

to be broadly encompassing in defining the class of plan "participants." As a comprehensive remedial statute enacted to protect employee benefit rights, ERISA should be construed liberally to effectuate its purposes. *Brink* v. *DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981); *Brock* v. *Self*, 632 F. Supp. 1509, 1520 (W.D. La. 1986); *Eaton* v. *D'Amato*, 581 F. Supp. 743, 746 (D.D.C. 1980). See *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (legislation protecting the rights of working people "must not be interpreted or applied in a narrow, grudging manner"). Thus, we agree with the court of appeals that the definition of "participant" should be construed to encompass those who claim eligibility for present or future benefits. Any former employee who requests information about an employee benefit plan in which he participated because he thinks he might be entitled to benefits must be given the information even if a return to work for the former employer is not possible.[24] As the court of appeals stated (Pet. App. A41-A42), that is how "participant" must be read in other provisions of ERISA, such as Section 502(a)(1)(B), which authorizes participants to bring suit claiming entitlement to benefits. It is undisputed that the plaintiffs were authorized to bring suit under Section 502(a)(1)(B) seeking benefits under Firestone's termination pay plan because they *claimed to be* entitled to benefits, even though the provision authorizes "participants" to

since a former employee may not be able to determine whether it is in his economic interest to resume his former employment unless he knows the extent of his rights under the plan. Therefore, in the absence of information about the plan, it would be impossible to know whether there was a significant probability that he would attempt to return to his former employer.

[24] There may be former employees whose claimed entitlements to benefits have no connection with their past employment. For example, a former employee who had never participated in a stock plan might request information about that plan because he thought he might be owed benefits. None of the present plaintiffs fall in that category, however, and the Court need not here determine what obligations, if any, would be owed to such a person.

bring suit rather than persons who "claim to be participants."

ERISA's drafters considered effective communication of plan contents to affected employees an "important issue" to be addressed in the Act (S. Rep. 93-127 at 11; H.R. Rep. 93-533 at 8). The drafters found the "generalized" disclosure requirements of the predecessor Welfare and Pension Plans Disclosure Act (WPPDA) to be "insufficient" and that "[c]hanges * * * in scope and detail" would be needed (S. Rep. 93-127 at 27; H.R. Rep. 93-533 at 11).[25] The resulting legislation established "a more particularized form of reporting" that would enable an individual to know "exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted" (*ibid.*). Thus, by design, ERISA's disclosure requirements supplement the statute's fiduciary standards by arming individuals "with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general" (*ibid.*).

Access to information is at least as important to a former employee who is unclear about the impact of his change in employment on current or future benefit rights as it is for either a current employee or an individual whose rights have vested. If mandatory disclosure of plan terms and con-

[25] While "participant" was defined by the WPPDA in virtually the same terms as in ERISA (see Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, § 3(a)(6), 72 Stat. 998 (1958)), the WPPDA's disclosure requirements and enforcement provisions applied only to participants and beneficiaries "covered under the plan" (§§ 5(a), 9(b), 72 Stat. at 999, 1002), thereby providing a limitation not found in Sections 104(b)(4) and 502(c), the corresponding provisions of ERISA. The Fifth Circuit based its limited view of ERISA disclosure rights (see note 23, *supra*)) on its prior decision in *Golden* v. *Kentile Floors, Inc.*, 512 F.2d 838, 849-850 (1975), which arose under the WPPDA, without noting the difference in the language or that Congress had found the WPPDA's disclosure provisions deficient.

ditions is as limited as Firestone contends, a significant number of workers who have participated in employee benefit plans may forever remain in the dark about their "stand[ing] with respect to the plan" (S. Rep. 93-127 at 27; H.R. Rep. 93-533 at 11) solely because of their change in employment status. Most importantly, those individuals will be left at the mercy of the plan administrators who, by refusing to provide requested information based on the *administrators'* view of former employees' rights, can effectively deprive them of the means of ascertaining for themselves the extent of their rights and, if necessary, pursuing enforcement action in the courts. Nothing could be farther from Congress's intent in enacting ERISA's disclosure requirements.[26]

Firestone contends (Br. 40-42) that a broad reading of "participant" will impose costly burdens on employee benefit plans. That fear is not justified. In providing that former employees may obtain information upon request, Section 104(b)(4) expressly provides that administrators may make a "reasonable charge." [27] As to the requirements of Sections 104(b)(1) and (3), 29 U.S.C. 1024(b)(1) and (3), that there be periodic distribution of various sorts of information, without charge and without request,[28] those "auto-

[26] Firestone's contention that there is no need for employers to respond to former employees' requests for information about employee benefit plans because they may "obtain a far broader range of information in the course of any ensuing litigation" (Br. 42) obviously misses the mark. Congress enacted Section 104(b) so that an employee would know "where he stands" (S. Rep. 93-127 at 27; H.R. Rep. 93-533 at 11) without filing suit.

[27] The Secretary has promulgated a regulation providing that a charge "is reasonable if it is equal to the actual cost per page to the plan for the least expensive means of acceptable reproduction, but in no event may such charge exceed 25 cents per page" (29 C.F.R. 2520.104b-30(b)).

[28] Section 104(b)(1) requires administrators to provide participants with a copy of the summary plan description and a summary of any material modification of the plan terms. Section 104(b)(3) requires administrators to send copies of annual statements describing the plan's assets and liabilities, along with a summary of the plan's receipts and disbursements from the prior plan year.

matic" disclosure requirements have been construed by the Secretary of Labor not to apply to every person defined as a "participant" by Section 3(7) of the Act.[29] By June 1975, less than a year after ERISA was enacted, the Secretary had promulgated proposed disclosure regulations and received comments on them.[30] The Secretary noted fears that administrators would be required to provide information "without charge and without written request" to many persons, such as "former employees who had no vested benefits when they left the employment." 40 Fed. Reg. 24649 (1975). Observing that the language of Section 101(a), 29 U.S.C. 1021(a), which governs the Section 104(b) automatic disclosure requirements, refers not to "participants" but to "participants covered under the plan," the Secretary concluded that "Congress provided a ground for distinguishing between the class of all participants included within the meaning of section 3(7) of the Act and the class of participants who are entitled to receive copies of plan documents without charge and without request" (40 Fed. Reg. 24649 (1975)).[31] The Secretary drew such a distinction in the regulations. Under 29 C.F.R. 2520.104b-1(c), distribution of plan documents without charge and without request need only be made to a narrower group of "participants covered under the plan." As defined in 29 C.F.R.

[29] Moreover, an annual summary report as required by Section 104(b)(3) need not be distributed to participants in a "totally unfunded welfare plan" such as Firestone's termination pay plan (29 C.F.R. 2520.104b-10(g)(1)).

[30] The Secretary of Labor has authority to prescribe regulations that "[s]he finds necessary or appropriate to carry out the provisions of [Title I of ERISA]," including its reporting and disclosure requirements. 29 U.S.C. 1135.

[31] In Section 502(c)(1), 29 U.S.C. 1132(c)(1), Congress authorized a penalty of up to $100 per day for failure "to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant." It thus created a penalty for violations of Section 104(b)(4), involved here, but not for failure to comply with Section 104(b)'s automatic disclosure provisions, although it provides for equitable relief (see 29 U.S.C. 1132(a)(3)).

2510.3-3(d)(2)(i), an individual ceases to be a participant covered by a welfare benefit plan when he becomes "ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur" and he is "not designated by the plan as a participant." Thus, plan administrators need not automatically provide plan documents to former employees whom plan administrators determine not to be eligible for benefits.[32]

At the same time that the Secretary narrowed the class of participants who must be provided information without charge and without request, he noted that other participants would be entitled to inspect plan documents pursuant to Section 104(b)(2), 29 U.S.C. 1024(b)(2), and obtain documents "upon written request at a reasonable charge under section 104(b)(4) of the Act and proposed § 2520.104b-30" (40 Fed. Reg. 24649 (1975)). Indeed, anticipating this case, the Secretary noted that the broader class of participants—which he had just noted included former employees like the three named plaintiffs—would be able to obtain information about the plan "in the event of a dispute between an employee of an employer maintaining the plan and plan officials as to the employee's status as a participant covered under the plan" (*ibid.*).

The statutory interpretations contained in the Secretary of Labor's regulations, adopted contemporaneously with the legislation, are entitled to "controlling weight" so long as they are reasonable and not inconsistent with the plain language of the statute. *Chevron U.S.A. Inc.* v. *NRDC,*

[32] Firestone misunderstands the regulations when it cites (Br. 35-36) the definition in Section 2510.3-3(d)(2)(i) in support of its contention that it did not have to provide information to the three named plaintiffs. Under the distinction drawn by the regulations, Firestone was not required to send them the information described in Section 104(b)(1) and (3), such as any material change in the terms of the plan, because they are not "participants covered under the plan." However, they are "participants" and are entitled to information upon request pursuant to Section 104(b)(4) and may enforce that right under Section 502(a)(1)(A) and obtain the penalty (up to $100 per day) provided in Section 502(c)(1).

Inc., 467 U.S. 837, 843-844 (1984); see *NLRB* v. *United Food & Commercial Workers Union*, No. 86-594 (Dec. 14, 1987), slip op. 10 n.20, 12; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The narrower regulatory definition of "participants covered under the plan" to whom automatic disclosure is required, which the Secretary adopted soon after ERISA went into effect, is a reasonable accommodation of ERISA's competing interests in providing access to information, on the one hand, and avoiding excessively burdensome administrative requirements, on the other. Therefore, the Third Circuit's approach to respondents' requests for plan information, which is consistent with the Secretary's authoritative interpretation of the Act, should be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., *et al.*,
Petitioners,
v.

RICHARD BRUCH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether the court of appeals erred in refusing to apply an arbitrary and capricious standard of review under ERISA to a plan administrator's benefits determination solely because the administrator, like most plan administrators covered by ERISA, was employed by the company that had established the plan.

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BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICI CURIAE*

With the written consent of the parties,[1] the Chamber of Commerce of the United States ("Chamber") and the National Association of Manufacturers of the United States of America ("NAM") submit this brief as *amici curiae* in support of petitioners. The Chamber is the nation's largest federation of businesses, representing more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade and professional associations and state and local chambers of commerce. The NAM is a voluntary business association of over 13,000 companies, employing 85 percent of all manufacturing workers and producing over 80 percent of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. Both the Chamber and the NAM regularly advocate their members' views in court on issues of national concern to the business community, and, in fact, *amici* previously submitted a brief in this case urging the Court to grant certiorari.

In the decision below, the Third Circuit held that the traditional "arbitrary and capricious" standard of judicial review does not apply to all denials of claims for employee benefits that are covered by the Employee Retirement Income Security Act of 1974 (ERISA). According to the Third Circuit, that standard is inappropriate when (a) a trustee whose salary is paid by the employer (b) administers a benefit plan under which benefits are paid from the general assets of the employer. The court of appeals held that the trustee in such circumstances faces a potential conflict of interest and therefore the trustee's decisions should be subject to *de novo* judicial

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court.

review, even when there is no showing that the trustee faces an actual conflict of interest.

Both the Chamber's and the NAM's memberships include many companies which maintain their own pension and welfare benefit plans, many of which are administered by employees of the companies and funded from the employers' general assets. The Third Circuit's decision not only would lead to a drain of funds available for employee benefits by requiring continuous *de novo* litigation of claim denials, but also would overload the federal judiciary and contravene the enforcement scheme Congress established in ERISA. Accordingly, *amici* wish to present their views in order to provide this Court with a legal framework that better balances the employees' legitimate concern that claim denials be based on the requirements of the plan with Congress' intent that the regulatory structure of ERISA not discourage employers from establishing benefit plans.

STATEMENT

The Employee Retirement Income Security Act

In passing the Employee Retirement Income Security Act of 1974 (ERISA), Congress responded to widespread and growing public demands for pension plan reform by enacting minimum standards for pension plan administration. 119 Cong. Rec. S16867 (daily ed. September 19, 1973) (statement of Senator Hartke); 29 U.S.C. § 1001. Under ERISA, workers can rely upon the promise of a future pension and look forward to "a retirement with financial security and dignity and without fear that [they] will be lacking in the necessities to sustain them as human beings within our society." H.R. Rep. No. 533, 93d Cong., 1st Sess. 8 (1973). Congress also enacted safeguards for employee welfare plans, *i.e.*, employee benefit plans other than pension plans.[2] 29 U.S.C. § 1003.

[2] The universe of employee benefit plans subject to ERISA comprises pension plans and welfare plans. 29 U.S.C. § 1002(3).

Pension plans include retirement income plans and deferred income plans. 29 U.S.C. § 1002(2)(A). Welfare plans include benefits for hospital and medical care, sickness and accident insurance, life insurance, disability payments, accidental death or dismemberment insurance, prepaid legal assistance, savings and vacation plans, scholarship funds, training programs and, as in this case, severance pay. 29 U.S.C. § 1002(1).

To ensure adequate supervision of employee benefit plans, employers are obligated to supply their workers with a clear and comprehensive description of every employee benefit plan. 29 U.S.C. § 1022. They also must file annual financial statements and other reports with the Department of Labor. 29 U.S.C. § 1023. To prevent the promise of retirement benefits from becoming illusory, workers must generally be considered eligible for pension plans within a year of starting their employment, 29 U.S.C. § 1052, and their accrued pension benefits must become increasingly nonforfeitable, or "vested," over time, 29 U.S.C. § 1053. Moreover, certain pension plans must satisfy minimum funding standards. 29 U.S.C. § 1082.

The Act also contains provisions directed against administrative mismanagement. These include the imposition of fiduciary responsibilities on plan administrators, 29 U.S.C. § 1104, and the creation of civil causes of action by which the Secretary of Labor or individual workers can enforce the administrator's fiduciary responsibilities, 29 U.S.C. § 1132. If a plan administrator breaches his fiduciary responsibilities, his potential liability is personal. He must compensate the plan for its resultant losses and disgorge to the plan any profits that he realized as a consequence of the breach. He is also subject to other appropriate relief, including removal from his position as plan administrator. 29 U.S.C. § 1109. Finally, to ensure that benefits will be paid even after the termination of a pension plan, as in the case of a plant closing, ERISA created the Pension Benefit Guaranty Corporation. 29 U.S.C. § 1302.

In enacting the safeguards of ERISA, Congress also recognized that excessive regulation of employee benefit

plans would be counterproductive. The legislative history of ERISA reflects congressional concern that high administrative costs would deplete the funds available for benefits,[3] and frustrate the "basic governmental policy of encouraging the growth and development" of private benefit plans.[4] Employers are not required to offer employees *any* benefit plans, and Congress believed that "if costs [were] made overly burdensome, particularly for employers," benefit plans would not develop as intended. 120 Cong Rec. H8702 (daily ed. Aug. 20, 1974) (statement of Rep. Ullman upon introducing the conference report). Thus, Congress imposed only minimum participation, vesting and funding standards on pension plans.[5] Moreover, Congress did not establish *any* participation, vesting or funding standards for welfare plans. 29 U.S.C. §§ 1051(1) and 1081(a)(1). Congress also permitted employers to maintain preferred methods of benefit plan administration. For example, when Congress was drafting ERISA, 60 percent of participants in private pension plans belonged to employer-administered plans. Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Statistical Analysis of Major Characteristics of Private Pension Plans* 31 (Comm. Print 1972). Congress facilitated this arrangement by allowing employers to appoint one of their officers or employees as the plan fiduciary. 29 U.S.C. §§ 1102(a)(2)

[3] 119 Cong. Rec. E6446 (daily ed. October 12, 1973) (statement of Rep. Nelsen).

[4] 120 Cong. Rec. H8702 (daily ed. August 20, 1974) (statement of Rep. Ullman upon introducing the conference report); 120 Cong. Rec. H1355 (daily ed. February 28, 1974) (statement of Rep. McKinney); 120 Cong. Rec. H8701 (daily ed. August 20, 1974) (statement of Rep. Dent).

[5] For example, employers need not include workers in their pension plans until they complete one year of service or reach the age of 21, whichever comes later. 29 U.S.C. § 1052(a)(1)(A). Moreover, the employer's contributions to an employee's retirement benefits need not become fully vested until the employee has completed at least ten years of service. 29 U.S.C. § 1053(a).

and 1108(c)(3). In all of these cases, Congress acted out of concern that the administrative cost of additional regulatory requirements would decrease the level of benefits or slow the rate of formation of new benefit plans. H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974).

In short, ERISA represents a careful and balanced effort to enact minimum and adequate employee safeguards that would not be unduly burdensome to employers and therefore "unfavorable rather than helpful to the employees for whose benefit [ERISA was] designed." 120 Cong. Rec. H8702 (daily ed. Aug. 20, 1974) (statement of Rep. Ullman upon introducing the conference report). See *Fort Halifax Packing Co.* v. *Coyne*, 107 S. Ct. 2211, 2217 (1987). Accordingly, the validity of the decision below must be evaluated against what Rep. Rostenkowski characterized as ERISA's "delicate" balance between stricter regulations for the protection of benefits and sufficient incentives to ensure the provision of benefit plans.[6]

The Decision Below

Respondents represent the class of non-union, salaried employees who were working in the Plastics Division of the Firestone Tire and Rubber Company and who continued in their jobs after the Division was sold in 1980 to the Occidental Chemical Corporation. Pet. App. A45. Before the sale, Firestone informed the employees in its Plastics Division that they would not be eligible for severance pay. Pet. App. A52. According to Firestone, its reduction in force provisions which governed severance pay did not apply when it sold an ongoing operation and its employees continued to work for the successor company with no significant loss in salary or benefits. Pet. App. A52.

Respondents brought this action in the United States District Court for the Eastern District of Pennsylvania

[6] 120 Cong. Rec. H8715 (daily ed. August 20, 1974) (statement of Rep. Rostenkowski).

under ERISA to recover severance pay and other benefits which they argued were due them as a result of the sale.[7] Despite their continued employment, respondents' theory was that the sale of the Plastics Division constituted "a reduction in force" by Firestone for which termination benefits were available under Firestone's Employee Handbook. Pet. App. A48. On cross motions for summary judgment, the district court found for Firestone on all of the respondents' then-pending claims. Pet. App. A73.

The court held that the determination that respondents were not entitled to reduction in force severance pay was neither arbitrary nor capricious. Pet. App. A56. The court noted that nothing in Firestone's policies or in the generally accepted meaning of the term "reduction in force" suggests that employees who remain in their jobs and continue to draw the same wages after the sale of a plant have suffered a termination because of a reduction in force. Pet. App. A53-A54.[8]

The court of appeals reversed. The Third Circuit recognized that "the clear weight of authority" among the courts of appeals supports use of the arbitrary and capricious standard to review decisions by administrators of benefit plans covered by ERISA. Pet. App. A8. Nonetheless, the court held that the denial of severance pay should be reviewed *de novo* in this case because Firestone faced a potential conflict of interest in deciding whether its assets should be used to satisfy respondents' claims for severance pay. Pet. App. A2-A3.

[7] Respondents also claimed retirement, stock and vacation benefits, which are described in the court of appeals' opinion. Pet. App. A4-A6. All of these claims have been withdrawn, settled or resolved in favor of Firestone. Pet. App. A3, A5-A6 n.2.

Certain individual respondents also sought damages under Section 502 (c) of ERISA, 29 U.S.C. § 1132 (c), for alleged deficiencies in Firestone's response to requests they made after the sale for information about Firestone's benefit plans.

[8] The court also denied respondents' Section 502(c) damages claims. Pet. App. A71-A72.

The court began its analysis by observing that the arbitrary and capricious standard was adopted for ERISA by analogy to cases concerning benefit plans governed by the Labor Management Relations Act ("LMRA") because the common law of trusts served as the basis of the fiduciary requirements imposed by Congress under both Acts. Pet. App. A14. The court noted, however, that the arbitrary and capricious standard could not be applied to ERISA without considering the differences between the LMRA and ERISA. Pet. App. A20-A21. Moreover, depending upon the method by which a benefit plan is funded, a denial of benefits by an administrator might mean that smaller contributions to the benefit plan would be required of the employer. Pet. App. A21-A22. The court stated that, in an employer-controlled, unfunded plan, the plan administrator faces a potential conflict of interest because his employer benefits when an employee's claim for benefits is denied. Pet. App. A24. Relying upon principles of trust law, the Third Circuit held that it should not defer to the judgment of the plan administrator in those circumstances. Pet. App. A24.

Having rejected the trust-based arbitrary and capricious standard of review for an employer-controlled, unfunded plan, the court of appeals turned to contract law for guidance and concluded that Firestone's adoption of a severance pay plan was an offer of a "unilateral contract" that its employees accepted by continuing employment with the company. Pet. App. A30. The court therefore held that the district court should not have deferred to the decision to deny benefits but should have determined for itself the validity of that decision "tak-[ing] as [its] starting point the principles governing construction of contracts between parties bargaining at arms' length." Pet. App. A25.[9]

[9] The court also reversed the district court on the Section 502(c) damages claims. Pet. App. A39-A44. *Amici* take no position on this issue which is also before the Court.

SUMMARY OF ARGUMENT

In establishing ERISA's fiduciary requirements for administrators of employee benefit plans, Congress employed the language of trust law, thereby manifesting its clear intent to incorporate into ERISA judicial interpretations of that body of common law. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). The legislative history of ERISA also demonstrates the intent of Congress to incorporate trust law principles into the fiduciary standards of ERISA. *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 152 (1985) (Brennan, J., concurring). Consequently, this Court must turn to general principles of trust law in determining the standard of review under ERISA for decisions by benefit plan administrators. *Amax Coal*, 322 U.S. at 329-34.

Under the common law, courts ordinarily apply an abuse of discretion or arbitrary and capricious standard of review to decisions by trustees concerning the disposition of trust assets. 3 A. Scott & W. Fratcher, *The Law of Trusts* § 187.2 (4th ed. 1988). Based on this principle, all twelve of the federal circuits have adopted an arbitrary and capricious standard to review decisions by benefit plan administrators under ERISA, including the decisions of administrators who are employees of the companies which establish the plans.

The existence of a *potential* conflict of interest does not change the analysis. Under trust law, a potential conflict of interest for a trustee does not automatically require the court to review the fiduciary's decision *de novo*. *Flinchbaugh* v. *Chicago Pneumatic Tool Co.*, 531 F. Supp. 110, 114 (W.D. Pa. 1982). In particular, when the potential conflict was apparent at the time the trust was created by the settlor, the court will defer to the decision of the trustee unless there is *specific evidence* that there was an actual conflict of interest that was not apparent at the time the trust was created. See, *e.g.*, *Goldman* v. *Rubin*, 292 Md. 693, 441 A.2d 713, 724 (1982). When Congress passed ERISA, it recognized that plan administrators commonly would be employed by the companies which established the plans and therefore would have a potential conflict of interest. Thus, the Third Circuit erred in applying the *de novo* standard solely on the basis of the administrator's potential conflict of interest and without any evidence that the administrator faced an actual conflict of interest.

The Third Circuit's decision would frustrate the goals of Congress when it passed ERISA. Congress expressly reserved to plan administrators the discretion involved in deciding claims for benefits. 29 U.S.C. §§ 1002(21)(A) and 1133(2). According to the court of appeals' reasoning, however, a substantial percentage of employee claims for benefits under ERISA would be subject to *de novo* review. Hence, the court's invocation of *de novo* review cannot be reconciled with the intent of Congress to leave decisionmaking primarily to plan administrators. Moreover, a *de novo* standard requires a time-consuming, fact-intensive judicial review. Consequently, the court of appeals' reasoning would impose substantial administrative burdens on pension plans that were not intended by Congress.

These burdens are not justified by any countervailing benefits. The fiduciary responsibilities of ERISA ensure that plan administrators will act solely in the interests of the employees. *Amax Coal*, 453 U.S. at 333-34. In addition, Congress chose to rely primarily upon actions by the Secretary of Labor or the employees for breach of fiduciary duty, instead of upon actions by employees to recover benefits allegedly due, for the enforcement of the fiduciary responsibilities. 120 Cong. Rec. S15742 (daily ed. Aug. 22, 1974) (statement of Sen. Williams upon introducing the conference report).

The arbitrary and capricious standard of review also ensures ample protection for employees. Courts have given the standard meaningful content and have closely scrutinized decisions by plan administrators when circumstances suggested that the decision was based on inappropriate grounds. *Holland* v. *Burlington Industries*, 772 F.2d 1140, 1149 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986). Hence, the Third Circuit's adoption of

a *de novo* standard is inconsistent with the congressional scheme and, in any event, unnecessary for the protection of employee benefits.

ARGUMENT

THE COURT OF APPEALS ERRED IN REFUSING TO APPLY THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW TO A PLAN ADMINISTRATOR'S DECISION TO DENY RESPONDENTS' SEVERANCE PAY CLAIMS.

I. The Congressional Analogy Of Employee Benefit Plans To Common Law Trusts Indicates That Congress Intended To Adopt An Arbitrary And Capricious Standard Of Review.

A. The Statutory Language And Legislative History Indicate That Principles Of Trust Law Govern The Standard Of Review Of Decisions By ERISA Plan Administrators.

The terms of ERISA plainly describe the trust-like nature of the employee plans it regulates. Under ERISA, all such plans are described as "benefit" plans, 29 U.S.C. § 1002(3), and are administered by a "fiduciary," 29 U.S.C. § 1102. Individuals who may become entitled to benefits are characterized as "beneficiaries," 29 U.S.C. § 1002(8), and all assets of employee benefit plans are to be "held in trust." 29 U.S.C. § 1103(a). These are traditional trust terms. Restatement (Second) of Trusts §§ 2 and 3 (1959). Moreover, ERISA defines the nature of the fiduciary role in the same terms as trust law. Fiduciaries are granted "authority to control and manage the operation and administration" of benefit plans, 29 U.S.C. § 1102(a)(1), including the authority to decide claims, 29 U.S.C. § 1133(2). Compare Restatement (Second) of Trusts §§ 169 and 177. In addition, the administrator's authority and control are "discretionary." 29 U.S.C. § 1002(21)(A). Compare Restatement (Second) of Trusts § 187 comment a. Finally, the fiduciary of a benefit plan must

> discharge his duties . . . solely in the interest of the participants and beneficiaries . . . with the care,

> skill, prudence, and diligence . . . [of] a prudent man . . . [and] in accordance with the documents and instruments governing the plan . . . .

29 U.S.C. § 1104. Congress intended by using this language to track the classic description of a trustee's duties under the common law. See H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973); compare Restatement (Second) of Trusts §§ 170, 174 and 186.

When Congress enacted the language of trust law, it thereby expressed its intention to adopt generally accepted judicial interpretations of that language. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). This inference concerning the intent of Congress is particularly strong here because, when Congress passed ERISA, its use of traditional trust law language in the Labor Management Relations Act of 1947 ("LMRA") had been construed by the courts. In the LMRA, Congress codified the trustee's common law duty of loyalty, 29 U.S.C. § 186 (c)(5), and the courts had consistently held that general principles of trust law apply to LMRA benefit plans. See, *e.g.*, *Gomez* v. *Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969); *Roark* v. *Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968); *Miniard* v. *Lewis*, 387 F.2d 864, 865 n.5 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968). For this reason, this Court has concluded that Congress' incorporation of trust law in ERISA "essentially codified the strict fiduciary standards" of the LMRA. *Amax Coal*, 453 U.S. at 332.[10] In short, the language of ERISA makes clear, as this Court has held, that the common law of trusts defines the responsibilities of an ERISA plan administrator.

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[10] Congress expressly recognized ERISA's relationship to the LMRA in the discussion of ERISA's enforcement provisions. When Senator Williams introduced the conference report for ERISA, he observed that Congress intended that actions brought by employees to enforce their benefit rights be "regarded as arising under the laws of the United States, in similar fashion to those brought under . . . the Labor Management Relations Act." 120 Cong. Rec. S15742 (daily ed. Aug. 22, 1974). *See Grossmuller v. United Automobile Aerospace and Agricultural Implement Workers*, 715 F.2d 853, 857 (3d Cir. 1983).

Central States Pension Fund v. *Central Transp.*, 472 U.S. 559, 570-74 (1985); *Amax Coal*, 453 U.S. at 332.[11]

The legislative history also unambiguously demonstrates that Congress intended to incorporate trust law principles into ERISA. *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 152 (1985) (Brennan, J., concurring). The committee reports and congressional statements are explicit that ERISA codified the fiduciary standards of trust law in the statute. H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973) ("[t]he fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts"); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295 (1974) ("[t]he labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries"); 120 Cong. Rec. S15741 (daily ed. August 22, 1974) (statement of Sen. Williams upon introducing the conference report) ("[t]he objectives of [the fiduciary] provisions are to make applicable the law of trusts . . ."). The legislative history also demonstrates that Congress specifically intended the fiduciary standards of trust law to govern the ERISA claims-administration process. *Massachusetts Mutual*, 473 U.S. at 153 (Brennan, J., concurring).

In adopting the principles of trust law, Congress did not accept those principles in their entirety. H.R. Rep. No. 533, 93 Cong., 1st Sess. 11-13. Nevertheless, it plainly did not intend to alter the standard of judicial review of a fiduciary's decisions. There is no provision in ERISA modifying the standard of review nor was there any discussion in the legislative history about modifying the standard. This is significant because Congress

[11] Because the language of ERISA unambiguously reflects a decision by Congress to model the administration of employee benefit plans on that of common law trusts, further analysis of congressional intent is not necessary. *Jones* v. *MARTA*, 681 F.2d 1376, 1379 (11th Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984).

specifically identified, and then modified, the principles of trust law which it felt were inconsistent with the purposes of ERISA. *Id.* at 12. Thus, for example, at common law, the creator of a trust may include an exculpatory clause in the trust agreement to shield the fiduciary from any liability for misuse of the trust's assets. *Id.*; Restatement (Second) of Trusts § 222. In enacting ERISA, Congress specifically precluded such exculpatory clauses. 29 U.S.C. § 1110. Similarly, under the common law of trusts, the creator of a trust may permit the trustee to make investments which would otherwise be prohibited as imprudent. H.R. Rep. No. 533, 93d Cong., 1st Sess. 12. In ERISA, Congress expressly condemned *all* imprudent investments. 29 U.S.C. § 1104.[12] In short, Congress' general approach was to adopt the common law of trusts. When it intended to make an exception, it did so.

The absence of any suggestion by Congress that it intended to modify trust law's standard of judicial review is particularly relevant in the context of pre-ERISA enforcement of entitlements to employee benefits. When it passed ERISA, Congress recognized that employees had generally relied upon "the traditional equitable remedies of the common law of trusts" to safeguard their benefits. S. Rep. No. 127, 93d Cong., 1st Sess. 5 (1973).[13] State courts applying trust law principles to disputes about employee benefits before ERISA had reviewed the plan administrator's decision under a deferential abuse of discretion standard. *Occidental Life Insurance Co.* v. *Blume*, 65 Wash.2d 643, 399 P.2d 76, 79 (1965); *Judge* v. *Kor-*

[12] Congress also stressed the duty of prudence. For example, fiduciaries must diversify investments to minimize the risk of large losses unless "it is clearly prudent not to do so." 29 U.S.C. § 1104 (a)(1)(C).

[13] Congress recognized that the inadequacy of pre-ERISA law lay not in the application of trust law remedies but in the absence of substantive requirements like vesting and funding. S. Rep. No. 127, 93d Cong., 1st Sess. 5 (1973). In other words, employees had remedies without rights.

tenhaus, 79 N.J. Super. 574, 192 A.2d 320, 328 (Super. Ct. 1963); *Whelan* v. *O'Rourke*, 5 A.D.2d 166, 170 N.Y.S.2d 284, 287 (1958); *Geron* v. *Kennedy*, 381 Pa. 97, 112 A.2d 181, 183 (1955). Thus, Congress must have assumed that this same deferential approach would be followed by federal courts in reviewing claims under ERISA.

Both the language and the legislative history of ERISA define the fiduciary responsibilities of benefit plan trustees in terms of common law trust principles. Consequently, this Court must turn to trust law to determine the standard of review under ERISA for decisions by benefit plan administrators. *Amax Coal*, 453 U.S. at 329-34.

B. Common Law Trust Principles Indicate That Courts Should Defer To The Decisions Of An ERISA Plan Administrator Despite His Potential Conflict Of Interest.

1. *Principles Of Trust Law Indicate That Courts Should Control A Plan Administrator's Exercise Of Discretion Only To Prevent Abuses Of That Discretion.*

The congressional choice of the trust model for ERISA is particularly relevant in this case with respect to the discretionary elements of benefit plan administration. According to trust law, the exercise of a trustee's powers is discretionary except when it is dictated by the terms of the trust or the principles of trust law. Restatement (Second) of Trusts § 187 comment a. Moreover, when the trustee exercises a discretionary power, courts cannot control that exercise "except to prevent an abuse by the trustee of his discretion." Restatement (Second) of Trusts § 187. Hence, courts have consistently declined to interfere with a trustee's discretionary decision unless the trustee abuses his discretion by acting arbitrarily, fraudulently, dishonestly or with an improper motive.[14]

[14] While courts employ several different verbal formulations for not deferring to a trustee's decision, these formulations are all tied

3 A. Scott & W. Fratcher, *The Law of Trusts* § 187.2 (4th ed. 1988); *Jefferson National Bank* v. *Central National Bank*, 700 F.2d 1143, 1152 (7th Cir. 1983); *American Cancer Society* v. *Hammerstein*, 631 S.W.2d 858, 863 (Mo. 1981); *Gimbel* v. *Bernard F. and Alva B. Gimbel Foundation, Inc.*, 166 Conn. 21, 347 A.2d 81, 89 (1974); *Kuykendall* v. *Proctor*, 270 N.C. 510, 155 S.E.2d 293, 301-02 (1967); *Kloman* v. *Doctor's Hospital, Inc.*, 76 A.2d 782, 785 (D.C. 1950).

ERISA follows the approach of trust law in its treatment of the discretionary elements of benefit plan administration. To the extent that an individual is granted "discretionary authority or discretionary control respecting [the] management of [a benefit] plan," he assumes the role of a fiduciary. 29 U.S.C. § 1002(21)(A). As part of his administrative responsibilities, the fiduciary has the sole authority to decide whether a claim for benefits was properly denied. 29 U.S.C. § 1133(2). Accordingly, to the extent that a decision regarding a claim for benefits is discretionary, the discretion resides with the plan administrator.

Congress had considered and rejected the alternative approach of arbitration for resolving disputes over benefit claims. H.R. 2 in the Senate, 93d Cong., 2d Sess. § 691(a) (1974). Had arbitration been chosen, Congress would have deprived the fiduciary of discretion in deciding benefit claims. Hence, in rejecting arbitration, Congress further demonstrated its intent to vest the plan administrator with discretion in deciding benefit claims.

to the reasonableness of that decision. Because the important point is that courts should defer to reasonable decisions by plan administrators, there is no need in this brief to focus on the differences among the alternative formulations which are, in any case, often not distinguishable. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971) (defining arbitrary, capricious and abuse of discretion in the same way). Instead, for the sake of simplicity, it makes sense to subsume all of them under the rubric of "arbitrary and capricious."

Because ERISA assigns the discretionary elements of the authority to decide claims to the plan administrator, it follows from trust law that courts can control the administrator in the exercise of his discretion only to prevent an abuse of discretion. Restatement (Second) of Trusts § 187. Consequently, all twelve of the federal circuits have applied the arbitrary and capricious standard of review to denials of benefits under ERISA.[15] The Third Circuit was simply incorrect when it suggested that these courts have "mechanically" applied the arbitrary and capricious standard from the LMRA to ERISA. As the previous discussion demonstrates, the arbitrary and capricious standard is derived directly from principles of trust law which Congress intended courts to follow in construing ERISA.[16]

2. *The Potential Conflict Of Interest Of An ERISA Plan Administrator Does Not Alter The Standard Of Review Because Congress Permitted The Potential Conflict.*

Under traditional trust law principles, the court below erred by declining to apply the arbitrary and capricious

[15] *Palino* v. *Casey*, 664 F.2d 854, 858 (1st Cir. 1981); *Schwartz* v. *Newsweek, Inc.*, 827 F.2d 879, 881 (2d Cir. 1987); *Northeast Dep't ILGWU Health and Welfare Fund* v. *Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 162-63 (3d Cir. 1985); *Berry* v. *Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *Bayles* v. *Central States, S.E. & S.W. Areas Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979); *Moore* v. *Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 457 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *Brown* v. *Retirement Committee of Briggs & Stratton*, 797 F.2d 521, 525-26 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1311 (1987); *Morgan* v. *Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981); *Jung* v. *FMC Corp.*, 755 F.2d 708, 711 (9th Cir. 1985); *Carter* v. *Central States S.E. and S.W. Areas Pension Plan*, 656 F.2d 575, 576 (10th Cir. 1981); *Helms* v. *Monsanto Co.*, 728 F.2d 1416, 1420 (11th Cir. 1984); *Maggard* v. *O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982).

The Third Circuit, of course, has deviated from the arbitrary and capricious standard when a potential conflict of interest exists.

[16] The Third Circuit in its discussion of the standard of review, Pet. App. A7-A26, never cited the legislative history of ERISA.

standard in the circumstances of this case. The court first observed that, because the Firestone plan administrator was Firestone itself and because denials of claims would redound to the benefit of Firestone, there was an inherent conflict of interest. Hence, the court concluded that "the principles of trust law require[d]" rejection of the arbitrary and capricious standard in favor of *de novo* construction of the trust document. Pet. App. A24. In effect, then, the court held that when a potential conflict of interest arises out of the structure of the benefit plan, *de novo* review is automatically required. This conclusion, however, is inconsistent with well-settled principles of trust law.

To be sure, courts will not and should not defer to trustees who act "from a motive other than to further the purposes of the trust." Restatement (Second) of Trusts § 187 comment g. However, the common law recognized the impracticality of eliminating all conflicts of interest. *Flinchbaugh* v. *Chicago Pneumatic Tool Co.*, 531 F. Supp. 110, 114 (W.D. Pa. 1982). Accordingly, "attenuated or hypothetical conflicts of interest" alone do not justify departure from the deferential standard. *Id.* See also *American Cancer Society*, 631 S.W.2d at 863-64; *Cosden* v. *Mercantile-Safe Deposit & Trust Co.*, 41 Md. App. 519, 398 A.2d 460, 471-72, *cert. denied*, 444 U.S. 941 (1979); *In re Thomas*, 311 A.2d 112, 114 (Del. 1973); *Burlingham* v. *Worcester*, 351 Mass. 198, 218 N.E.2d 123, 125-26 (1966); *Phelan* v. *Middle States Oil Corp.*, 220 F.2d 593, 604 (2d Cir.), *cert. denied*, 349 U.S. 929 (1955).

Moreover, trust law uniformly condones the existence of a *potential* or "hypothetical" conflict of interest if the potential conflict was readily apparent when the trust was created and was clearly accepted by the creator of the trust (the "settlor"). In such circumstances, courts do not decline to defer to a trustee because of the potential conflict unless it matured into an actual conflict.[17]

[17] A potential conflict occurs when a trustee has a duty of loyalty only to the beneficiaries of the trust but has a relationship to a

G. G. Bogert and G. T. Bogert, *The Law of Trusts and Trustees* § 543(U), at 373 (rev. 2d ed. 1978); *Flinchbaugh*, 531 F. Supp. at 114; *Gregory* v. *Moose*, 266 Ark. 926, 590 S.W.2d 665, 670-71 (Ct. App. 1979) (Arkansas law); *State of Delaware* v. *Belin*, 456 So. 2d 1237, 1241 (Fla. Dist. Ct. App. 1984) (Florida law); *Lovett* v. *Peavy*, 253 Ga. 79, 316 S.E.2d 754, 756-57 (1984) (Georgia law); *Childs* v. *National Bank of Austin*, 658 F.2d 487, 490 (7th Cir. 1981) (Illinois law); *Fielder* v. *Howell*, 6 Kan. App. 2d 565, 631 P.2d 249, 251 (1981) (Kansas law); *Goldman* v. *Rubin*, 292 Md. 693, 441 A.2d 713, 714 (1982) (Maryland law); *Bank of Nevada* v. *Speirs*, 95 Nev. 870, 603 P.2d 1074, 1077 (1979), *cert. denied*, 449 U.S. 994 (1980) (Nevada law); *Renz* v. Beeman, 589 F.2d 735, 744-45 (2d Cir. 1978), *cert. denied*, 444 U.S. 834 (1979) (New York law); *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585, 600 (1983) (Pennsylvania law).[18]

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non-beneficiary that might cause him to breach that duty. *See, e.g., American Cancer Society*, 631 S.W.2d at 863. An actual conflict of interest occurs when the trustee has duties of loyalty to beneficiaries and non-beneficiaries that conflict with each other. *See, e.g., Childs* v. *National Bank of Austin*, 658 F.2d 487, 490 (1981). A potential conflict would mature into an actual conflict if the trustee allows his relationship to a non-beneficiary to actually influence his decisions.

[18] The Third Circuit did not rest its analysis on the basis that the challenged decisions arose in the context of a sale of a corporate division. Nevertheless, that fact does not alter the analysis. Under fundamental principles of trust law, the arbitrary and capricious standard applies when a fiduciary is acting to end the trust relationship. Restatement (Second) of Trusts § 334 comment d; G. G. Bogert & G. T. Bogert, *The Law of Trusts and Trustees* § 1000, at 314-17 (rev. 2d ed. 1983); 4 A. Scott, *The Law of Trusts* § 334.1, at 2644-45 (3d ed. 1967). Moreover, it also applies when the decision to end the trust relationship favors one beneficiary over the others and the trustee has ties to the favored beneficiary. *American Cancer Society*, 631 S.W.2d at 863. In such a setting, the court defers unless the claimant introduces specific evidence that there was an actual conflict of interest, rather than only a potential conflict. *Id.*

Thus, the judicial inquiry into a trustee's potential conflict is governed by the actual administration of the trust, not by the fact that the potential conflict of interest existed. *Belin* 456 So. 2d at 1240; *Lovett*, 316 S.E.2d at 757; *Goldman*, 441 A.2d at 723. Since potential conflicts that arise out of the structure of the trust fall into the category of those conflicts that are recognized in advance and accepted, trust law presumes that trustees are not influenced by structurally-based, potential conflicts.

The potential conflicts of interest that arise because the fiduciary of an employee benefit plan works for the employer were in fact recognized and accepted by Congress. When Congress passed ERISA, it knew that administrators of private pension plans commonly worked for the employer. According to a study of the private pension plan system undertaken by Congress, 60 percent of participants in private pension plans belonged to employer-administered plans. Staff of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Statistical Analysis of Major Characteristics of Private Pension Plans* 31 (Comm. Print 1972). Nevertheless, Congress applied the same fiduciary standards to virtually all benefit plans,[19] without regard to who would administer them. 29 U.S.C. § 1101(a). Moreover, Congress expressly intended that agents of the employer, when serving as plan administrators, would exercise their discretion in administering ERISA plans despite their potential conflict of interest. 29 U.S.C. § 1108(c)(3) (permitting employers or their representatives to serve as fiduciaries); 29 U.S.C. § 1002 (16)(A) (recognizing that the exercise of discretion is inherent in the role of a fiduciary). Analogizing Congress to the settlor in terms of the creation of the trust arrangement, it is plain that the relevant party envisioned the potential conflict of interest identified by the court of

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[19] The fiduciary standards do not apply to deferred compensation plans for select members of management or for highly compensated employees. 29 U.S.C. § 1101(a)(1). They also do not apply to payments to retired partners or the estates of deceased partners. 29 U.S.C. § 1101(a)(2).

appeals and condoned it. Under trust law, there is no basis for the court to ignore that decision and to scrutinize *de novo* all decisions arising out of that arrangement.

II. Adoption Of An Arbitrary And Capricious Standard Of Review Is Compelled By The Regulatory Scheme That Congress Enacted In ERISA.

A. A *De Novo* Standard Of Review Would Frustrate Congress' General Purposes In Passing ERISA.

A decision to retain the deferential standard of review, despite an apparent "conflict," would advance Congress' intent to grant employers "the freedom of decision-making vital" to the existence of employee benefit plans. S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973). Congress recognized that overly burdensome regulation of benefit plans would discourage employers from creating new plans or expanding existing plans. Moreover, higher administrative costs would also limit the growth and development of benefit plans. 120 Cong. Rec. H8702 (daily ed. Aug. 20, 1974) (statement of Rep. Ullman upon introducing the conference report). Hence, Congress established minimal standards under ERISA, reserving for employers considerable discretion to decide the substantive and administrative features of their benefit plans.

As discussed above, *supra* p. 16, Congress expressly assigned the discretion to decide benefit claims to the plan administrator. The Third Circuit's decision, however, would apply to the vast majority of benefit claims disputes thereby frustrating Congress' express intent to leave administration of these plans to the discretion of administrators. As the court of appeals itself explained, a potential conflict of interest arises out of the structure of a plan when (1) the benefit plan is administered by the employer and (2) the funding of the plan is such that a denial of benefits redounds to the advantage of the employer rather than another employee. For pension plans, this usually occurs for (1) single employer plans [20] that

[20] Pension plans are divided between single employer and multi-employer plans. While multi-employer plans are generally governed

are also (2) defined benefit plans.[21] A vast majority of pension plan assets are included in plans that meet these two criteria. According to 1981 data, of the nearly 700 billion dollars in private pension plan assets, 91 percent of the assets were held by single employer plans and 71 percent of the assets were held by defined benefit plans. Office of Pension & Welfare Benefit Programs, U.S. Department of Labor, *The Handbook of Pension Statistics 1985* 12 (1986).[22] For welfare plans, precise data are not readily available. Nevertheless, it is clear that the number of individuals involved here is also substantial. In the case of health care benefits, for example, a potential conflict would arise in the vast majority of plans.[23] Employers who self-insure directly profit from a denial of benefits. Moreover, employers who use third-party insurers gain from a denial since an employer's health insurance premiums are gen-

by employers and employees jointly, single employer plans are almost always administered by employers alone.

[21] Pension plans are divided between defined benefit and defined contribution plans. In defined benefit plans, the employer promises a specific level of benefits. For example, the monthly benefit might equal a sum of money times the number of years of employment. In defined contribution plans, the employer agrees to contribute a specified amount of money to the pension plan fund each year. When an employee is denied benefits from a defined benefit plan, the employer generally gains because a lower level of contributions will be needed to provide the promised benefits.

As this discussion indicates, the Third Circuit's apparent distinction between funded and unfunded plans does not adequately distinguish plans which may result in a potential conflict of interest from those that do not. Even with funded plans, there may be a potential conflict of interest.

[22] Preliminary data indicate that these percentages changed little between 1981 and 1984. Compare *The Handbook of Pension Statistics 1985*, *supra*, Table 1 at 18 with Pet. Amicus. Br. Table A at 1a. At the same time, total pension plan assets have doubled to almost 1.5 trillion dollars. *ERISA 1986 Report to Congress*, *supra*, at i.

[23] Over 20 million workers in medium and large firms receive health care benefits. Bureau of Labor Statistics, U.S. Department of Labor, *Employee Benefits in Medium and Large Firms, 1986* (Bulletin 2281).

erally based on the amount of benefits paid out in the previous year.

Given the high percentage of claims which would involve a "potential" conflict of interest as defined by the Third Circuit, it is impossible to reconcile the court's invocation of *de novo* review with Congress' intention to leave decisionmaking primarily to the plan administrators acting as fiduciaries. Congress did not intend for most claims to be decided by courts employing contract principles, and the court of appeals' failure to recognize this fact is fatal to the decision below.

A *de novo* standard of review would also contravene the intent of Congress to avoid burdensome regulation of employee benefit plans. With a *de novo* standard of review, there would be greatly increased incentives to litigate ERISA claims. That effect, together with the fact that judicial review would focus on the specific details of each claim, means that employee benefit plans would be subject to constant, time-consuming litigation. Continuously defending administrators' eligibility determinations would present administrative and financial strains on benefit plans. This case well illustrates the problem. The court of appeals has remanded respondents' claims for an analysis by the parties and the district court of the customary interpretation in the industry of this kind of severance pay provision, as applied to the sale of a business. Plainly, this inquiry will require substantial discovery by the litigants. In addition, the court of appeals has invited an inquiry into whether Firestone had done *anything* to give its employees reason to expect severance pay in the circumstances presented. Pet. App. A29-A31. This plainly opens up an enormous potential for discovery and a significant likelihood of a protracted hearing. Thus, the cost in terms of time, effort and money to the plan of proceeding further with this single class of claims may well prove to be enormous.

The administrative burdens in general would also be unjustifiably high. The coverage of ERISA is very broad. It protects the retirement income of approximately 42 million Americans who participate in nearly 800,000 pri-

vate pension plans. *ERISA 1986 Report to Congress, supra,* at i. It also protects the benefits of the 65 million Americans who participate in the 4.5 million employer-sponsored welfare plans. *Id.* Hence, every time a worker submits a physician's or dentist's bill for reimbursement or every time a worker files for retirement benefits and the plan administrator denies the claim, in part or in full, a potential claim under ERISA arises that likely would be subject to *de novo* review.

B. The Arbitrary And Capricious Standard Fully Serves The Goals Of Congress.

1. The Fiduciary Requirements Of ERISA Ensure That The Plan Administrator Serves The Interests Of The Plan Beneficiaries.

Congress relied upon the arbitrary and capricious standard despite the widespread potential conflicts of interest because ERISA's fiduciary responsibilities ensure that plan administrators will act independently of the employers' interests. The court of appeals erred by implicitly assuming that, whenever a plan administrator is employed by the company whose plan is being interpreted, the administrator's interests will be identical to the company's.[24] However, the plan administrator's interests are defined by his functions, not his employment relationship. *Cf. Polk County* v. *Dodson*, 454 U.S. 312, 319 (1981). As this Court has observed, the fiduciary responsibilities of ERISA were designed to prevent the administrator from owing a duty of loyalty in his fiduciary role to anyone

[24] This case is in a slightly unusual posture because respondents did not file any claims for severance pay with an administrator of the Firestone benefit plan. Nevertheless, the court of appeals analyzed the case under trust principles on the apparent assumption that the interpretation of the severance pay plan challenged by respondents was that of a fiduciary. Our analysis is based on the same assumption. If that assumption is not correct, the Court still should not permit the court of appeals' opinion to remain undisturbed as the law of the Circuit. Its use of an incorrect standard of review should be vacated and the matter remanded for an assessment of whether the posture of the case affects how the court of appeals would dispose of it.

other than the employees. *Amax Coal*, 453 U.S. at 333-34.[25] In particular, it is the administrator's duty to act *solely* in the interests of the benefit plan beneficiaries for the *exclusive* purposes of providing benefits to those entitled and defraying the reasonable costs of operating the plan. 29 U.S.C. § 1104(a)(1). Consequently, the effect of the fiduciary responsibilities is to ensure that a plan administrator does not represent the interests of any party, including those of the employer that appointed him, which would conflict with the interests of the employees. *Amax Coal*, 453 U.S. at 334.[26]

Congressional confidence that plan administrators would protect the interests of employees is illustrated by the legislative history. Congress expressly considered and rejected arbitration, 120 Cong. Rec. S15750 (daily ed. Aug. 22, 1974) (statement of Sen. Javits), and administrative review by the Department of Labor, 119 Cong. Rec.

[25] Moreover, the plan administrator has a relatively attenuated personal interest in the outcome of his decisions to grant or deny benefit claims. As a salaried employee of the company, his income does not directly or indirectly increase when fewer benefits are paid.

[26] Public defenders are not viewed as state actors even though the state fixes their compensation, hires their support staff, provides their office supplies and equipment, decides their case load—thereby effectively deciding the amount of time spent on each case—supervises their work and establishes general guidelines for them in carrying out their representation. *Polk County* v. *Dodson*, 454 U.S. at 331-333 (Blackmun, J., dissenting). Similarly, employees who act as plan administrators are not expected to act, nor do they act, as agents of their employers' interests when administering their employers' benefit plans.

Moreover, the employer's purposes in establishing a benefit plan are best served if the plan administrator acts solely in the interests of the beneficiaries. A plan administrator who acts otherwise compromises the harmony of employer-employee relations. This is true even if the beneficiaries are no longer employed by the company, as in the case of pension plans or severance pay plans. Current workers will not trust the promises to pay them benefits after they have left employment if the company fails to pay benefits to those who have already left employment.

S16899-900 (daily ed. Sept. 19, 1973) (statements of Sen. Hartke and Williams), as alternative approaches to the resolution of disputes over benefit claims. Thus, Congress concluded that plan administrators would be sufficiently independent decisionmakers such that review of their decisions should be deferential rather than *de novo*.

The effectiveness of ERISA's fiduciary responsibilities in maintaining the plan administrator's independence from the employer has been recognized by the Treasury Department as well. The Internal Revenue Code includes an exemption from the corporate income tax for certain employee benefit plans. 26 U.S.C. § 501(c)(9). In its implementing regulations, Treasury established as a criterion for tax exempt status that the benefit plan be an "employees'" plan. 26 C.F.R. § 1.501(c)(9)-1(a). This occurs when the plan is controlled by the membership of the plan or by independent trustees. 26 C.F.R. § 1.501(c)(9)-2(c)(3). A plan may satisfy the independent trustee requirement if it is an employee benefit plan subject to the fiduciary requirements of ERISA. 26 C.F.R. § 1.501(c)(9)-2(c)(3)(iii).

ERISA not only mandates fiduciary responsibilities; it subjects plan administrators to disciplinary action for violations of those responsibilities. Congress gave the Secretary of Labor primary responsibility for the enforcement of ERISA's fiduciary responsibilities. 120 Cong. Rec. S15742 (daily ed. Aug. 22, 1974) (statement of Sen. Williams upon introducing the conference report). In carrying out this responsibility, the Secretary may bring a civil action against a plan administrator for breach of his fiduciary duties. 29 U.S.C. § 1132(a)(2). If the court finds a breach of those duties, it will order the administrator to compensate the plan for any losses that resulted from the breach, 29 U.S.C. § 1109(a); *Massachusetts Mutual*, 473 U.S. at 140, and to turn over to the plan any profits realized by him in his use of the plan's assets, 29 U.S.C. § 1109(a). Moreover, the administrator may be removed from his position or be subject to any other remedies deemed appropriate by the court. *Id.* The

Secretary of Labor may also bring a civil action to enjoin any act or practice which violates the fiduciary responsibilities of ERISA or to obtain other appropriate equitable relief to either redress a violation of the fiduciary responsibilities or enforce these responsibilities. 29 U.S.C. § 1132(a)(5). Beneficiaries may bring the same causes of action as the Secretary of Labor to enforce ERISA's fiduciary responsibilities. 29 U.S.C. § 1132(a)(2) and (a)(5).[27] In view of the availability of this full range of remedies, it cannot lightly be assumed that Congress intended to turn routine claims to recover benefits into costly judicial searches for breaches of fiduciary duty.[28]

The procedural requirements of ERISA also provide good reason for the presumption that plan administrators employed by the company do not face an actual conflict of interest. First, these requirements directly limit the likelihood that a plan administrator will act on the basis of a potential conflict. Whenever a claim for benefits is denied, the benefit plan must set forth in writing the specific reasons for the denial, describe any additional material or information necessary for the employee to perfect the claim, and explain why that material or information is necessary. 29 U.S.C. § 1133(1); 29 C.F.R. § 2560.503-1(f). In addition, the plan must afford the claimant an opportunity for "full and fair review" of the decision denying the claim before the plan administrator. 29 U.S.C. §§ 1133(2) and 1102(a)(1).[29] These stringent

[27] An action to enforce ERISA's fiduciary requirements is distinct from an action to recover benefits. Compare 29 U.S.C. § 1132(a)(2) and (a)(5) with § 1132(a)(1)(B).

[28] Indeed, while Congress gave the federal courts exclusive jurisdiction over actions alleging a breach of fiduciary duty, it gave the federal and state courts concurrent jurisdiction over actions seeking the recovery of benefits. 29 U.S.C. § 1132(e)(1); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974).

[29] At a minimum, a plan administrator must inform the employee of what evidence he relied upon and provide the employee with an opportunity to review the evidence and present written comments

obligations to document the decisionmaking process make it very difficult for plan administrators to hide an arbitrary or capricious decision and therefore discourage them from acting out of improper motives. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).[30] As a corollary, the documentation helps ensure that employees and courts will recognize when decisions are based on improper motives.[31] The employees or the Secretary of Labor will then be able to assert the rights of the employees in court and obtain relief. Finally, as a result of the procedural requirements, courts are presented with a record from which they can judge whether a reasonable decision was rendered without engaging in *de novo* review.

2. *The Arbitrary And Capricious Standard Provides Ample Protection For Employees.*

Congress relied upon the arbitrary and capricious standard also because it provides ample protection for employees. Under that standard, courts consider several factors, including whether the administrator has (a) construed the terms of the plan uniformly, (b) interpreted the plan in accordance with its terms, and (c) administered the plan in accordance with the requirements of ERISA. Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033, 1047-48 (1985); *Miles* v. *New York State Teamsters Conference Pension & Retirement Fund*

and/or documentary evidence in rebuttal. *Grossmuller*, 715 F.2d at 857-58 & n.5; 29 C.F.R. § 2560.503-1(g).

[30] Having to justify their decisions ensures that benefit plan administrators not only do not act unreasonably but also that they take the most appropriate action. In the process of explaining their decisions in writing, administrators must carefully analyze the bases of their decisions.

[31] If a denial of a claim for benefits is based on questionable logic, that will trigger suspicion and likely trigger an inquiry into the administrator's motives by the employee when the matter is before the district court.

Employee Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir), *cert. denied*, 464 U.S. 829 (1983).[32]

Moreover, courts will take a "close look" at the administrator's determination whenever particular circumstances suggest that the administrator did not engage in "reasoned decisionmaking," *Maggard*, 671 F.2d at 571, or when the administrator acted fraudulently or in bad faith. *Sly* v. *P. R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983).[33] Thus, decisions by administrators based on inappropriate grounds can be, and have been, set aside under the arbitrary and capricious standard. *Van Boxel* v. *Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987); *Holland* v. *Burlington Industries*, 772 F.2d 1140, 1149 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).[34]

[32] These factors naturally follow from the trust law principle that the exercise of a trustee's power is discretionary "except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees." Restatement (Second) of Trusts § 187 comment a.

[33] Although a "close look" involves greater care in examining the decision of the administrator, it nevertheless requires the court to approve the decision if it is based on the documents and instruments of the plan and it is not an unexplained deviation from prior decisions. Thus, even if the court itself would have decided the issue differently, it still must uphold the administrator's decision. Under a *de novo* standard, the court is not constrained at all by the administrator's interpretation of the plan or how that interpretation applies to the particular claim. Instead, the court decides whether the claim should be upheld based on contract principles. Under these principles, of course, the inquiry is much broader and therefore more burdensome on the parties. *See* p. 22, *infra*.

[34] The widespread use in federal law of the arbitrary and capricious standard demonstrates the confidence that Congress has in the standard's ability to protect individual interests. Decisions by federal administrative agencies are reviewed under that standard. 5 U.S.C. § 706. Congress also has adopted a standard of judicial deference for decisions by certain private parties. In particular, courts play "only a limited role" when reviewing the decisions of arbitrators. *United Paperworkers International Union* v. *Misco, Inc.*, 108 S. Ct. 364, 370 (1987). They "are not authorized to

While the arbitrary and capricious standard of review is appropriate for the vast majority of disputes involving employee benefit claims, traditional principles of trust law ensure that a *de novo* standard of review will be used as needed. Thus, for example, if the trustee has a direct and immediate financial stake in the outcome of a decision, the court will decide for itself which course of action is in the best interests of the beneficiaries. Restatement (Second) of Trusts § 187 comment g, illustration 2. Similarly, if an employee introduces evidence that the benefit plan administrator denied an employee's claim for benefits in order to realize a direct pecuniary gain, the court should subject the administrator's decision to *de novo* review.[35] No such showing was made or even attempted in this case.

* * * *

In sum, the Third Circuit's decision is inconsistent with the scheme established by Congress in ERISA. It ignores the important role Congress intended for plan administrators to play in making claims determinations. It discourages employers from creating or expanding benefit plans by imposing unduly heavy administrative burdens. Moreover, it substantially increases the expense of administering a benefit plan. What makes these burdens impossible to justify is that they will be imposed without adding significantly to the protection of employee benefits.

reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.*

[35] For instance, an employee could make such a showing if the administrator's income were formally tied to the frequency of benefit denials. *Cf.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1926); *NLRB* v. *Ohio New and Rebuilt Parts, Inc.*, 760 F.2d 1443, 1448 (6th Cir.), *cert. denied*, 474 U.S. 1020 (1985). Or, the employee might be able to show an informal tie, for example, if the administrator's yearly compensation tended to correlate with the financial performance of the benefit plan. In addition, a tie would exist if the employer had made clear, either explicitly or by his firings of previous plan administrators, that a plan administrator would not be kept on the job if too many benefits were paid out.

The Third Circuit obviously drew a different balance than did Congress when considering the costs and benefits of a *de novo* standard of review. But that is not the province of a court. As the Sixth Circuit observed, there is simply "no law" to support a stricter standard of review in ERISA cases. *Varhola* v. *Doe*, 820 F.2d 809, 813 (6th Cir. 1987). Congress struck a particular balance of interests when it selected trust law as the basis for implementing employee benefit plans. It was not for the court of appeals to substitute its judgment for Congress' concerning how these plans can best be administered. *Badaracco* v. *CIR*, 464 U.S. 386, 398 (1984). For this reason, the decision of the court of appeals should be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 87-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER COMPANY, *et. al.*,
Petitioners,

v.

RICHARD BRUCH, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE TRAVELERS INSURANCE COMPANY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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I.

QUESTION PRESENTED

Should a benefits claim decision made by a fiduciary of an employee benefit plan which is regulated by the Employee Retirement Income Security Act of 1974, as amended, be afforded a high degree of judicial deference in accordance with principles of the common law of trusts?

II.

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BRIEF OF THE TRAVELERS INSURANCE COMPANY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DESCRIPTION AND INTEREST OF *AMICUS CURIAE*[1]

The Travelers Insurance Company ("Travelers") markets insurance policies and insurance-related services and activities throughout the United States. A significant portion of Travelers' insurance business involves the sale of policies which fund benefits provided under employee benefit plans which are regulated by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 *et seq.* ("ERISA").[2] A similarly

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[1] This brief was filed with the consent of the parties involved; evidence of such consent is on file with the Clerk of the Court pursuant to Rule 36 of this Court. This brief addresses only the issue regarding the standard of review to be applied by the judiciary in reviewing benefit claims decisions of employee benefit plan fiduciaries.

[2] As used throughout this brief, the terms "plan" or "plans" are intended to reference only those arrangements which are regulated by ERISA. Citations throughout this brief are to ERISA; see the Table of Authorities for parallel U.S.C. citations.

significant portion of Travelers' business throughout the United States consists of providing services necessary for the maintenance and administration of plans. Such services, which may be provided in conjunction with a policy funding such a plan or which may be provided pursuant to an administrative-services-only contract, include: claims processing, preparation of administrative forms, preparation and distribution of disclosures required by ERISA, calculation of funding requirements and projected cost estimates, assistance in plan design and preparation of materials which are required to be filed with governmental agencies.

In this case, the Third Circuit Court of Appeals has made a significant departure from the deferential standard of judicial review historically applied to plan fiduciaries' benefit claims decisions. Such decision purports to eliminate any judicial deference to such fiduciary decisions under certain circumstances. If upheld, the Third Circuit's decision will inevitably result in the following: (i) inconsistent application of plans in fact situations which are similar in all respects except the jurisdiction of the reviewing court; (ii) additional costs (e.g., the difference between defending a trial *de novo* as opposed to the more limited review of judicial deference and the cost of providing unintended benefits) creating a disincentive to establish or continue such plans; and (iii) unlimited and unwarranted judicial interference in plans' operation and administration.

For the reasons described above, the Third Circuit's decision below directly affects the plans of Travelers' customers and, thus, the business of Travelers. For the same reasons and to the extent that Travelers acts as administrative fiduciary, claims processor or service provider of such plans, the Third Circuit's decision below directly affects Travelers' conduct of such activities.

SUMMARY OF ARGUMENT

Since ERISA's enactment, the federal courts have developed a body of federal common law under ERISA which, when added to ERISA's statutory provisions, constitutes the uniform and

comprehensive body of law governing plans as intended by Congress. As a part of this body of law, the federal courts have adopted a highly deferential standard of judicial review of fiduciaries' claims decisions. Such standard, which has been given the somewhat unfortunate name of the "arbitrary and capricious standard of review", was developed almost exclusively by reference (either directly or indirectly) to common law trust principles. Support for reference to such law was derived from manifestations of Congressional intent in enactment of ERISA as evidenced by the content and structure of the law itself, its legislative history, and its striking similarity to parallel provisions of the Labor Management Relations Act (which has itself been fleshed out by federal common law which referenced the common law of trusts).

Because the Third Circuit's decision below frustrates Congressional intent as to the applicable law to be applied to the operation and administration of plans and because it is at odds with the overall structure of ERISA, it should be reversed. Such reversal should take the form of an opinion of this Court which provides clear and effective guidance regarding the proper standard of judicial review of benefit claims decisions of plan fiduciaries.

ARGUMENT

I.

ERISA IS A CAREFULLY ORCHESTRATED WHOLE AND SHOULD BE CONSTRUED ACCORDINGLY

ERISA itself does not directly address the question of the standard of review that courts are to apply when reviewing the conduct of plan fiduciaries. This is surprising given the degree of care with which ERISA was crafted in terms of imposing requirements and standards with respect to plan fiduciaries and plan operation and administration:

> 1. "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries

who jointly or severally shall have authority to control and manage operation and administration of the plan." ERISA § 402(a)(1).

2. "Every employee benefit plan shall . . . describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan . . .." ERISA § 402(b).

3. ". . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) deferring reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to so do; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this Title or Title IV." ERISA § 404(a)(1).

4. "The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than the named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan." ERISA § 405(c)(1).

5. "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice

which violates any provision of this Title or the terms of the plan . . . or to enforce any provision of this Title or the terms of the plan . . .." ERISA § 502(a).

6. "In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participants, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." ERISA § 503.

Some fundamental concepts regarding Congressional intent as to the scope and nature of ERISA's regulation of the operation and administration of plans can be extrapolated from the foregoing statutes without resort to examination of the legislative history of ERISA. First, Congress intended that both the ongoing operation and administration of plans as well as the investment of plan assets would be the responsibility of the individuals or entities appointed by the plan sponsor in the document establishing the plan. Second, Congress intended that those individuals and entities charged with the responsibility of administration and operation of a plan would occupy the same fiduciary status and would be subject to the same statutory standard of conduct as those individuals and entities who were fiduciaries responsible for the investment of the plan's assets. Third, Congress intended and, in fact, mandated by statute that administrative fiduciaries of plans themselves give the highest degree of deference to the terms and provisions of plan documents and that they deny or modify a benefit claim pursuant to very formal procedures and, in the case of a participant's appeal, only after the most careful and considered review. Fourth, since there are no proscriptions against the sponsor of the plan or an officer of such sponsor serving as either an administrative or an investment fiduciary with respect to such plan, Congress intended to permit them to do so (providing, however, special protection for plans

having such fiduciaries via the prohibited transaction sanctions of section 406 of ERISA, with a concomitant statutory rule under section 408(c)(3) of ERISA pursuant to which such sanctions were not to be construed to prevent service as a fiduciary by an officer, employee or agent of the plan sponsor). Fifth, since Congress did not provide different standards governing the conduct of plan sponsors or their officers who serve as plan fiduciaries and did not by statute charge them with more onerous requirements to follow in terms of plan operation and administration or the investment of plan assets, Congress felt that such differentiation would be inappropriate and unnecessary. Finally and most importantly, having addressed fully in the statute allocation of fiduciary responsibilities, a very high mandated standard of fiduciary conduct and imposition of the requirement that fiduciaries police each other under section 405 of ERISA, Congress intended that the decisions and determinations of a plan fiduciary, be it administrative or investment fiduciary, be given great weight.

In sum, ERISA may be silent on the standard of judicial review to be accorded the decisions of plan fiduciaries but the "mood" of the statute would seem to compel a determination that courts exercise a high degree of judicial deference in reviewing their decisions and determinations. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 470, 487 (1951).

II.

THE MULTIPLE TRUST LAW PROVISIONS SPECIFICIALLY INCORPORATED IN THE TEXT OF ERISA EVIDENCE CONGRESSIONAL INTENT THAT TRUST LAW SHOULD BE THE BASIC BODY OF LAW GOVERNING ERISA

In drafting ERISA, Congress was not operating in a total void. Either of two well-developed bodies of law— contract or trust law—could have been used as a model to frame the structure of ERISA. The conclusion is inescapable that Congress chose trust law as a basis for framing ERISA. As the following comparison demonstrates, the duties and standard of conduct

for plan fiduciaries as set forth in ERISA are clearly derived from trust law principles:

Law of Trusts	ERISA
The trustee is under a duty ... to administer the trust solely in the interest of the beneficiary. Restatement (Second) of Trusts § 170(1) (1959).	... a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants ... ERISA § 404(a)(1).
The trustee ... is under a duty ... to communicate all material facts [to the beneficiary] ... Restatement (Second) of Trusts § 170(2) (1959).	The administrator of each employee benefit plan shall cause to be distributed ... a summary plan description and the information described in sections 104(b)(3) and 105(a) and (c) [of ERISA]. ERISA § 101(a).
The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts ... Restatement (Second) of Trusts § 172 (1959).	An annual report shall be published with respect to every employee benefit plan ... ERISA § 103.
The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information ... Restatement (Second) of Trusts § 173 (1959).	*See* Reporting of Participants Benefit Rights, Retention of Records, and Record-keeping and Reporting Requirements. ERISA §§ 105, 107 and 209.
The trustee is under a duty to the beneficiary ... to exercise such care and skill as a man of ordinary prudence would exercise ... Restatement (Second) of Trusts § 174 (1959).	A fiduciary shall discharge his duties ... with the care, skill, prudence and diligence ... that a prudent man ... would use ... ERISA § 404(a)(1)(B).
If there are several trustees, then each ... is to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust ... Restatement (Second) of Trusts § 184 (1959).	... a fiduciary shall be liable for a breach of the fiduciary responsibility of another fiduciary ... if ... he has enabled such other fiduciary to commit such breach ... or he has knowledge of [such] breach ... unless he makes reasonable efforts to remedy the breach. ERISA § 405(a).
The trustee can properly incur expenses which are necessary or appropriate to carry out the purposes of the trust ... Restatement (Second) of Trusts § 188 (1959).	A fiduciary ... shall discharge his duties ... for the exclusive purpose of providing benefits to participants ... and defraying reasonable expenses of administering the plan ... ERISA § 404(a)(1)(A).
The beneficiary of a trust can maintain a suit to compel the trustee to perform his duties as a trustee, to enjoin the trustee from committing a breach of trust, ... to appoint a receiver ... [or] to remove the trustee. Restatement (Second) of Trusts § 199 (1959).	A civil action may be brought by a participant ... to enjoin any act or practice which violates any provision of this Title or the terms of a plan, to obtain other appropriate equitable relief, to redress such violations or to enforce any provisions of this Title or the terms of the plan. ERISA § 502.

Law of Trusts	ERISA
If the trustee commits a breach of trust, he is chargeable with (a) any loss... resulting from the breach of trust, or any profit made by him through the breach of trust ... Restatement (Second) of Trusts § 205 (1959).	Any person who is a fiduciary ... who breaches his ... duties ... shall be personally liable to make good any losses to the plan resulting from each such breach and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan ... ERISA § 409.
... The trustee is under a duty to the beneficiary to distribute the risk of loss by a reasonable diversification of investments, unless under the circumstances it is prudent not to do so. Restatement (Second) of Trusts § 228 (1959).	A fiduciary shall discharge his duties ... by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so ... ERISA § 404(a)(1)(C).

There are other similarities between the common law of trusts and ERISA; the foregoing are merely some of the more striking similarities.

Congress itself declared its reliance upon trust law in crafting ERISA: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 533, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649. Obviously, ERISA differs from trust law principles in some respects and, where the statute expressly does so, it prevails. Where the statute is silent, however, the courts should reference trust law to carry out Congressional intent. Moreover, the silence of ERISA as to the issue of judicial review of fiduciary decisions was not a Congressional oversight. Early versions of ERISA incorporated proposed alternatives (arbitration and administrative agency review) to the trust law principle of deferential judicial review and such alternatives were rejected. *See* S.Rep. No. 383, 93d Cong., 1st Sess. 110, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 5000; H.R. 2, 93d Cong., 2d Sess. § 691, 120 Cong. Rec. 5001 (1974). In addition, Congress had a later opportunity to reexamine such issue and declined to act. *See* H.R. 6226, 97th Cong., 2d Sess. (1982) (bill to amend Section 502 of ERISA to provide for *de novo* review of decisions denying benefits; referred to committee but never reported by committee for action).

In sum, the common law of trusts is a part and parcel of ERISA. It permeates throughout the content and structure of the statute and was what Congress intended to be the reference for purposes of development of federal common law under ERISA. There is no basis for deserting application of such principles as to a given part of or issue arising under ERISA. Indeed, to do so would likely upset or throw out of balance that delicately and carefully structured body of law.

III.

EXCEPT FOR THE THIRD CIRCUIT COURT OF APPEALS DECISION BELOW, ALL COURTS AGREE REGARDING APPLICABLE LAW AND CONGRESSIONAL INTENT

This Court has already ruled that Congress intended to incorporate trust law as the primary source of federal common law under ERISA and, further, that Congress intended that courts draw on that source of law in reviewing the conduct of plan fiduciaries:

> ... rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trust. 3 A. Scott, Law of Trusts § 186, p. 1496 (3d ed. 1967) (hereinafter "Scott").
>
> The manner in which trustee powers may be exercised, however, is further defined in the statute through the provision of strict standards of trustee conduct, also derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care.

Central States Pension Fund v. Central Transports, Inc., 472 U.S. 559,570 (1985).

Although the *Central States Pension Fund* case involved matters relating to preservation of plan assets, this Court's

discussion regarding the applicability of trust law was not limited to plan asset investment issues but encompassed operation and maintenance issues including, specifically, issues relating to determination of plan eligibility as well as compliance with reporting and disclosure requirements:

> One of the fundamental common law duties of a trustee is to preserve and maintain trust assets, *Bogert, supra,* § 582, at 346, and this encompasses determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries. *Id.* § 583, at 348 (footnotes omitted) . . . A trustee is similarly expected to "investigate the identity of the beneficiary when the trust documents do not clearly pick such party" and to "notify the beneficiaries under the trust of the gifts made to them. *Id.* at 348-349, n.40.
>
> The provisions of ERISA make clear that a benefit plan trustee is similarly subject to these responsibilities, not only as a result of general fiduciary standards of loyalty and care, borrowed as they are from the common law, but also as a result of more specific trustee duties itemized in the Act. For example, the Act's minimum reporting and disclosure standards require benefit plans to furnish all participants with various documents informing them of their rights and obligations under the plan, *see,* e.g., 29 U.S.C. §§ 1021, 1022, 1024(b), a task that would certainly include the duty of determining who is in fact a plan participant.

Central States Pension Fund, 472 U.S. at 572.

Several federal courts have specifically and correctly invoked trust law as the basis for ruling that the arbitrary and capricious standard is the appropriate standard of review of plan benefit claims decisions under ERISA. Some have chosen to do so directly:

> In *Reiherzer v. Shannon,* 581 F.2d 1266, 1272 (7th Cir. 1978) . . . we established that a challenge under section 502(a)(1)(B) of ERISA to a denial of pension benefits by a pension fund's trustees was to be overturned by a federal court only if it was "arbitrary and capricious in light of the language of the plan". Along with the Fifth and Eighth Circuits, we thus applied the traditional standard of review of the law of trusts used in diversity jurisdiction cases challenging such decisions. *Bayles v. Central States Pension Fund,* 602 F.2d 97, 99-100 & n.3 (5th Cir. 1979); *Bueneman v. Central States Pension Fund,* 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *see, also, Riley v. MEBA Pension Trust,* 570 F.2d 406, 408, 410 (2d Cir. 1977). The same standard of review applies to trustees' plan interpretations in an action seeking leave under section 502(a) generally.

Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 823-824 (7th Cir. 1980).

> Brown argues that this Court should abandon the "arbitrary and capricious" standard in disability benefit cases because this analogy to trust law is inappropriate. Brown argues that a trustee protects and promotes the interests of the trust's beneficiary, but in disability benefit cases an adversarial relationship allegedly exists because the claimant seeks disability benefits and the retirement committee functions as "a claims adjuster of insurance funds".
>
> This description, however, is inaccurate . . .
>
> The fiduciary provisions of ERISA were designed to prevent a trustee "from being put into a position where he has dual loyalties and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.
>
> The language and legislative history of section 302(c)(5) [of the LMRA] and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. *NLRB v. Amex Coal Co.,* 453 U.S. 322, 334, 101 S.Ct. 2789, 2796, 69 Lawyers Ed.2d 672 (1981) (quoting H.R. Conf. Rep. No. 93-1280, at 309 (1974) U.S. Code Cong. and Admin. News 1974, p. 4639). Because the administrator of a pension plan under ERISA is bound to act in the best interests of the plan participants, just as a trustee must exercise his fiduciary duty for the trust beneficiary, the adoption of a standard of review from trust law is appropriate.

Brown v. Retirement Comm., 797 F.2d 521, 526 (7th Cir. 1986).

Other federal courts have reached a similar determination that trust law mandates use of the arbitrary and capricious

standard by analogizing and comparing ERISA's civil enforcement and fiduciary provisions to those of section 302(c)(5) Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5):

> The "arbitrary and capricious" standard derives from section 302(c)(5) of the LMRA. That section imposes a duty of loyalty on section 302 trustees by permitting employer contributions to a welfare trust fund only if the contributions are used "for the sole and exclusive benefit of the employees . . .". Section 1104 of ERISA imposes a similar duty of loyalty, and not surprisingly the courts have applied the "arbitrary and capricious" standard under ERISA as well.

Struble v. New Jersey Brewery Employees Welfare Trust, 732 F.2d 325, 333 (3d Cir. 1984). Such analysis inevitably led (albeit indirectly) to the application of trust law because that was the law applied for purposes of developing the deferential standard of judicial review of Taft-Hartley plan fiduciaries. *See Kosty v. Lewis,* 319 F.2d 744 (D.C. Cir. 1963); *Ruth v. Lewis,* 166 F. Supp. 346 (D.D.C. 1958); (application of common law trust principles reasoning that a participant's status vis-a-vis the plan was that of beneficiary of a trust); *Compare Hobbs v. Lewis,* 159 F. Supp. 282 (D.D.C. 1958) (application of contractual rights analysis which resulted in imposition of an arbitrary and capricious standard of review). In sum, the arbitrary and capricious standard of review of fiduciary claim decisions under Taft-Hartley plans was a well-developed part of federal common law at the time of ERISA's enactment, and its extension to ERISA plan fiduciary decisions was logical and appropriate given the similarities and interplay between ERISA and the LMRA.[3]

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[3] Imposition of the arbitrary and capricious standard of review as developed with respect to trustees' decisions under Taft-Hartley plans to ERISA plans which are not themselves Taft-Hartley plans has not gone unquestioned, however. *See Varhola v. Doe,* 820 F.2d 809 (6th Cir. 1987) and *Van Boxel v. The Journal Company Employees' Pension Trust,* 836 F.2d 1048 (7th Cir. 1987).

IV.

THE COMMON LAW OF TRUSTS MANDATES JUDICIAL DEFERENCE TO FIDUCIARY DECISIONS

Congress left absolutely no doubt that the statutes comprising ERISA were to be fleshed out by a body of federal common law to be developed by the federal courts: "It is also intended that a body of federal law will be developed by the courts to deal with the issues involving rights and obligations under private welfare and private pension plans." Remarks of Senator Javits, 120 Cong. Rec. 29,942 (1974). In developing such body of federal common law, the courts, of course, would be confined by the statute comprising ERISA and Congressional intent, as evidenced both by the structure of such statute and the legislative history to ERISA. As discussed above, the federal courts have correctly referenced trust law as the basic body of law from which the federal common law under ERISA is to be developed. The question then becomes: Does the arbitrary and capricious standard of judicial review of plan fiduciaries' claims decisions represent an accurate reflection of common law trust principles?

The judicial standard of review applicable to common law trustees is one of great deference. If a trustee is given discretionary power, a court will not control or veto his exercise of it, instruct him how to use it, or substitute its own judgment for that of the trustee. *Restatement (Second) of Trusts* § 187 (1959); G. Bogert, *Trusts & Trustees* § 394 (2d ed. 1978); III A. Scott & W. Fratcher, *The Law of Trusts* § 187 (4th ed. 1988). A court will interfere, however, when a trustee has abused his discretion. Actions which are dishonest or in bad faith, such as acceptance of a bribe, are one example of conduct which is an abuse of discretion. *Restatement, supra,* comment f, at 403; III A. Scott, *supra,* § 187.4, at 44-45. Actions or decisions made with an improper motive, such as spite, prejudice or furtherance of some interest of the trustee or of a person other than a beneficiary, also constitute an abuse of discretion. *Restatement, supra,* comment g, at 404; III A. Scott, *supra,* § 187.5, at 46-47.

An abuse of discretion is also present where a trustee acts beyond the bounds of reasonable judgment. This rule applies

where a trustee has discretion regarding the management or investment of trust assets. A trustee must utilize proper care and skill, and must act prudently. *Restatement, supra* p. 13, comment i, at 406; III A. Scott, *supra* p. 13, § 187.2, at 33. The same principle of reasonableness is applicable to a trustee's discretionary power to make payments to beneficiaries. An abuse of discretion occurs when a trustee is paying less (or more) than a reasonable person would under the circumstances. *Id.*

Moreover, failure to use any judgment at all constitutes an abuse of discretion. For example, a decision made without knowledge or without inquiry is an abuse of discretion, as is an arbitrary decision made at the whim of the trustee. *Restatement, supra* p. 13, comment h, at 405. A trustee might also fail to exercise judgment because of an erroneous belief as to a matter of law. For example, a trustee might refuse to sell trust property due to an erroneous belief that he has no power of sale. III A. Scott, *supra* p. 13, § 187.3, at 43.

Relevant factors in evaluating a trustee's conduct are: (1) the extent of discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (4) the circumstances surrounding the exercise of the trustee's power; (5) the motives of the trustee in exercising or refraining from exercising his power; and (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries. *Restatement, supra* p. 13, comment d, at 403; III A. Scott, *supra* p. 13, § 187, at 15.

In reviewing a trustee's actions or decisions, a court must consider only the circumstances present at the time the action or decision took place, not the circumstances present at a subsequent time when his conduct is being questioned. *Restatement, supra* p. 13, § 174, comment b, at 379, § 227, comment o, at 535; G. Bogert, *supra* p. 13, § 541, at 159. "[I]t is by no means just for a judge to say, after bad consequences have arisen from an act done by a person exercising fiduciary powers, that he should have foreseen what subsequently happened, and therefore be held guilty of a breach of trust. If he did not foresee what no

person of ordinary foresight, standing in his place, could have foreseen, he has violated no duty, and incurred no liability." G. Bogert, *supra* p. 13, § 541, at 163. Thus, a trial *de novo* conducted by the court is inappropriate in the trust context.

To summarize, the well-settled judicial standard of review applicable under the common law of trusts is highly deferential. A court may not interfere with the decisions or actions of a trustee unless an abuse of discretion is demonstrated. Conduct which constitutes an abuse of discretion can be placed in four categories: (1) dishonesty/bad faith; (2) improper motives; (3) failure to exercise reasonable judgment; and (4) failure to use any judgment. A court is limited to consideration of circumstances present at the time the conduct occurred.

V.

THERE IS A LACK OF UNIFORMITY IN COURTS' APPLICATION OF THE STANDARD OF JUDICIAL REVIEW OF FIDUCIARIES' DECISIONS

With the exception of the aberrant decision in the case below, all federal courts, including the Third Circuit Court of Appeals, have applied a deferential standard of review to benefit claim decisions of plan fiduciaries as derived from the trust law standard of judicial review.[4] However, the courts have been considerably less than uniform in their application of trust law principles, and such differing applications bred the current confusion over the appropriate standard of judicial review of benefit claims decisions.

[4] *Rueda v. Seafarers Int'l Union*, 576 F.2d 939 (1st Cir. 1978); *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977); *Shiffler v. Equitable Life Assur. Soc.*, 838 F.2d 78 (3rd Cir. 1988) (wherein the Third Circuit attempts to distinguish its own decision in the case below); *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197 (4th Cir. 1984); *Denton v. First Nat'l Bank*, 765 F.2d 1295 (5th Cir. 1985); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1987); *Bueneman v. Central States, Southeast & Southeast Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978); *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981); *Anderson v. Cieba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985); *Maggard v. O'Connell*, 671 F.2d 568 (D.C. Cir. 1982).

With the exception of the Second and Eleventh Circuits, the courts agree that the basic standard of judicial review is that "a plan fiduciary's decision must be upheld unless it is demonstrated to be arbitrary and capricious." *See* Authorities referenced in footnote 4 and discussed below. The inconsistency among the circuits arises from the various expansions or additions given to the standard by the courts. For example, the Fourth, Seventh, and Ninth Circuits impose the additional requirement that the decision be supported by substantial evidence. *LeFebre*, 747 F.2d at 208; *Wardle*, 627 F.2d at 824; *Music v. Western Conference of Teamsters Pension Fund*, 712 F.2d 413, 418 (9th Cir. 1983). The Sixth and Ninth Circuits require that the decision be made in good faith. *Adcock*, 822 F.2d at 626; *Music*, 712 F.2d at 418. The Seventh and Ninth Circuits will overturn a fiduciary's decision if it was based on an erroneous interpretation of law. *Wardle*, 627 F.2d at 824; *Music*, 712 F.2d at 418. The Eighth Circuit will uphold a fiduciary's decision unless it is "arbitrary or capricious or an abuse of discretion". *Bueneman*, 572 F.2d at 1209.

Finally, the Second and Eleventh Circuits abandon the "arbitrary and capricious" language and define the judicial standard of review as "determining whether the fiduciary's interpretation was made rationally and in good faith, not whether it was right". *Riley*, 570 F.2d at 410; *Anderson*, 759 F.2d at 1522. Although the language used to describe the standard varies from circuit to circuit, all courts give a high degree of deference to a fiduciary's decision.

To compound the confusion, courts have considered a wide range of factors when reviewing a fiduciary's decision. The most common factor is consideration of the plan language itself, determining whether the fiduciary's decision or interpretation is consistent with the plan language and whether the language has been interpreted or applied uniformly. *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 100 (5th Cir. 1979); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1151 (6th Cir. 1985); *Jung*, 755 F.2d at 713. Another common factor is whether the fiduciary had adequate evidence or factual development to support his decision. *See, i.e., Brown*, 797 F.2d at 532. Some courts consider whether the fiduciary's decision is

consistent with prior practice, *Jung*, 755 F.2d at 713, and others consider whether the fiduciary was acting in bad faith. *Cook v. Pension Plan for Salaried Employees*, 801 F.2d 865, 871 (6th Cir. 1986).

The Fourth Circuit will not consider ERISA procedural violations in evaluating a benefit decision, *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985), but the First, Seventh, and Ninth Circuits have held that egregious reporting violations may be relevant. *Barry v. Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707, 714 (1985); *Wolfe v. J.C. Penney Co., Inc.*, 710 F.2d 388, 393 (7th Cir. 1983); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984). Another area of disagreement among the circuits is the cost factor. For example, the Fifth Circuit has held that a fiduciary may properly limit benefits if an alternative decision would result in unanticipated costs to the plan so as to potentially limit resources available to the proper beneficiaries. *Bayles*, 602 F.2d at 100. Similarly, a court may consider the fiduciary's decision in light of his responsibility to all beneficiaries of the plan. *Rueda*, 576 F.2d at 942. Conversely, some courts consider avoidance of a substantial outlay to be indicative of a fiduciary's bad faith. *Jung*, 755 F.2d at 711.

In sum, the federal courts are in agreement that a fiduciary's decision must be given a high level of deference but have not consistently articulated the standard of review or the factors to consider when evaluating a fiduciary's decision. This Court now has the opportunity to formulate a uniform standard of judicial review.

VI.

THIS COURT SHOULD SETTLE THE STANDARD OF JUDICIAL REVIEW OF FIDUCIARIES' DECISIONS FOR PURPOSES OF UNIFORMITY

Courts have advanced many reasons why the arbitrary and capricious standard of review of plan fiduciaries' decisions is appropriate. These reasons support a conclusion that the arbitrary and capricious standard is appropriate regardless of

whether ERISA must be interpreted in accordance with trust law principles. First, the arbitrary and capricious standard leads neither to the abdication of the traditional role of fiduciaries nor to excessive judicial intervention in trust operations. *Rehmer v. Smith,* 555 F.2d 1365, 1371 (9th Cir. 1976). Second, the arbitrary and capricious standard fulfills Congressional intent that plan fiduciaries have and retain primary responsibility for claims processing. *Denton,* 765 F.2d at 1304. Third, the fiduciaries of a plan are deemed to be knowledgeable of the plan's purpose and operation and therefore are in the best position to make judgments regarding application of its provisions to a given set of circumstances such that their decisions should not be taken lightly by a court. *Holland,* 722 F.2d at 1148. Fourth, excessive judicial interference regarding plan fiduciaries' decisions would hamper the efficient and orderly day-to-day administration of plans, in clear conflict with Congressional intent. *Cook,* 801 F.2d at 871. Finally, excessive judicial interference in the ongoing operation and administration of plans would create a disincentive to employers' adoption, maintenance and expansion of such plans, both because of the additional costs resulting from additional scope of litigation involving plan fiduciaries' decisions, as well as the costs of payment of unanticipated benefits ordered by judicial fiat, thus disturbing the careful balance between regulation of these plans and employers' rights to design, implement and operate such plans as intended by Congress. H.R. Rep. No. 533, *supra* p. 8, at 4647; 120 Cong. Rec. 29,198 (1974) (Statement of Rep. Ullman).

There remains, however, the question of the correct standard of review of fiduciaries' decisions. Travelers respectfully submits that such standard should constitute a reasoned composite of the standards developed by the various federal courts since enactment of ERISA. It should recognize, as a starting point, that a fiduciary's benefit claim decision invariably involves three steps: (1) development of the facts and circumstances regarding the claimant's situation; (2) interpretation of the pertinent provisions of the plan; and (3) application of such interpretation to the claimant's situation. Viewed logically, the court's review of such fiduciary's action should follow the same track.

1. *Review of Facts and Circumstances.* A benefit plan claimant has a duty to place the facts and circumstances on which he bases his benefit claim before the fiduciary. The fiduciary then has the burden of reviewing such facts and circumstances and a limited duty to investigate further, if it deems such investigation appropriate. If the claim is denied, the claimant has the right to a full and fair review under ERISA's claim procedure and the right to place additional facts before the fiduciary. Because of these procedural protections, the courts should have only two alternatives in terms of review of facts and circumstances: to make a determination regarding the fiduciary's decision considering only the facts and circumstances which were before the fiduciary, or to remand the case back to the fiduciary for further development of the facts. Under either alternative, the fiduciary's determinations regarding factual conflicts should be given high deference. The second alternative should only be available if the record before the fiduciary was so deficient as a result of the fiduciary's failure to investigate (as opposed to the claimant's failure to cooperate, provide requested information, etc.) or so marred by procedural errors that a prudent fiduciary would have declined to make a decision based on such record.

2. *Plan Interpretation.* If the plan language is ambiguous or deficient or if the plan is simply silent, the court should give the greatest possible deference to the fiduciary's interpretation of the plan. The plan must be, as a practical matter of operation, fleshed out by its fiduciary's ongoing interpretation and administrative guidelines. When a plan document confers upon its fiduciaries powers of interpretation for purposes of ongoing administration, the sponsor of the plan has delegated to such fiduciaries the authority of such substantive interpretation as may be necessary to create orderly and efficient operation. Such scheme of operation was clearly contemplated by Congress and should not be set aside lightly by the courts. Left then, are the following situations in which a judicial reversal of a plan administrator's interpretation of a plan would be appropriate: the interpretation is clearly contradicted by the terms of the plan itself; the interpretation conflicts directly with past interpretations of the plan; the interpretation, although valid on its face, causes the plan to conflict with applicable law in operation; or the

interpretation, although valid on its face, is clearly inconsistent with the overall structure and purpose of the plan.

3. *Application of the Facts to the Plan Interpretation.* If the court has determined that the facts before the plan fiduciary were insufficient or has reversed the fiduciary's interpretation of the plan, this third step will not be reached. If, however, the court has determined that the facts before the fiduciary were sufficient to enable a decision by that fiduciary and that the fiduciary's interpretation of pertinent plan provisions must be upheld, then the court must determine whether application of the fiduciary's interpretation of the plan to the facts before the fiduciary would support the fiduciary's decision. Once again, great deference should be given to the fiduciary's factual determinations and plan interpretation and the court should interfere only if there is clear evidence of dishonesty or bad faith, or if the facts before the fiduciary as applied to the fiduciary's own interpretation of the plan would so clearly lead to a different result than that determined by the fiduciary that a prudent man could not have made such determination.

VII.

IF THE THIRD CIRCUIT DECISION IS UPHELD, IT SHOULD BE LIMITED

In its decision, the Third Circuit ruled as a matter of law that no judicial deference is to be given to the decision of a plan fiduciary if that plan fiduciary has a conflict of interest. Assuming that this Court is to uphold the Third Circuit, this Court's decision should be limited to circumstances where there is a clear conflict of interest on the part of a plan's fiduciary and there is no intervening neutralizing factor. For instance, a plan sponsor as the named fiduciary of a plan may retain the services of an unrelated neutral party to assist in the processing of claims under the plan or may consult with an independent fiduciary or retain independent counsel. In such situations, there would be a neutralizing influence vis-a-vis any potential conflict of interest that the plan sponsor might have. Accordingly, the rationale of the Third Circuit is and should be held to be inapplicable to such situations.

CONCLUSION

Travelers respectfully requests the Supreme Court to reverse the judgment below with regard to the issue considered in this *Amicus Curiae* brief for the reasons stated herein.

Respectfully submitted,

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No. 87-1054

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., *et al.*,
Petitioners,
v.
RICHARD BRUCH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should courts review *de novo* the claims determinations of an employer acting as fiduciary, administrator and processor of claims for benefits under an unfunded employee benefits plan governed by the Employee Retirement Income Security Act of 1974, or should the determinations of such an employer be reviewed under the arbitrary and capricious standard?

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTERESTS OF THE AMICI

The American Council of Life Insurance (the "Council") represents the interests of 650 member companies and is the largest life insurance trade association in the United States. The Health Insurance Association of America ("HIAA") represents 350 member companies and is the largest health insurance trade association in the United States.

Members of the Council and the HIAA play a central role under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA" or the

"Act"). As of 1984, 8% of all employment-related health plans were self-insured. Today, HIAA estimates that commercial health insurance companies alone determine benefits in connection with funded and employer self-insured health programs covering 75.8 million people. Three-quarters of all self-insured plans enlist the aid of an insurance company or other third party to administer claims payment.

The decision of the Third Circuit Court of Appeals at issue in this case directly affects the interests of the Council and the HIAA. *Amici*, without conceding that the Third Circuit's decision applies to their members, are concerned that if the decision were affirmed, it *could* require *de novo* review of every claim for benefits denied under every ERISA plan their members insure or for which they administer claims. Such a result would increase the cost of funding and administering such plans, thereby restricting the availability and scope of welfare benefits members of the Council and the HIAA could provide, even though ERISA was designed by Congress to promote the greater availability of such benefits.[1]

STATEMENT

Plaintiffs are non-union, salaried employees for Firestone Tire and Rubber Co. ("Firestone"). They brought this action to recover, *inter alia*, termination pay and other benefits allegedly due to them as the result of the sale of their collective bargaining unit to another corporation. Certain individual plaintiffs also claimed damages under section 502(c) of the Act, 29 U.S.C. § 1132(c), for alleged violations of ERISA's disclosure requirements.

[1] *Amici* address in this brief only the first issue (standard of review) presented in the petition for a writ of *certiorari*. The parties have consented to the filing of this brief. Pursuant to Rule 36 of the Rules of this Court, the parties' letters of consent have been filed with the Clerk.

On cross-motions for summary judgment, the District Court ruled in Firestone's favor on all of plaintiffs' then-pending claims. (A73) According to the court, Firestone's determination that plaintiffs were not entitled to reduction-in-force ("RIF") termination pay was neither arbitrary nor capricious. The court noted that nothing in the employee benefit plan or the history of its interpretation indicated that plaintiffs-employees had suffered a RIF. (A53-A54) The court also denied the remainder of plaintiffs' damage claims on other grounds.

A panel of the United States Court of Appeals for the Third Circuit reversed both of these holdings. The court recognized the clear weight of authority supporting the arbitrary and capricious standard of review in civil actions for recovery of ERISA benefits. However, the court held that Firestone's decision on termination pay should be reviewed *de novo*. (A3) In the court's view, Firestone's status as the sole administrator of its unfunded termination-pay plan created a conflict of interest. Because of this presumed conflict, the court varied from the arbitrary and capricious standard. Specifically, the court concluded that it should evaluate Firestone's decision regarding the denial of termination-pay benefits by applying principles of "construction of contracts between parties bargaining at arms' length" after *de novo* review. (A25)

The Court of Appeals also reversed the District Court's decision on other grounds. However, in this brief, *amici* address only the failure of the Third Circuit to apply the arbitrary and capricious standard to Firestone's benefits decision.

SUMMARY OF ARGUMENT

Although the Third Circuit's decision may be limited to its particular facts, the possibility exists that if it were given a broad reading, millions of claims denied by life and health insurers under ERISA employee benefit

plans could be subject to *de novo* review. *De novo* review would destroy the careful balance between the desire of Congress, on the one hand, to provide prompt claims resolutions under ERISA plans, and on the other, to encourage ERISA plan formation by controlling plan costs —a balance which Congress worked hard to achieve. It would also burden the court with review of claims large and small, in a way Congress never intended.

The balance which Congress sought to achieve can be preserved by requiring that all ERISA claims denials be reviewed by the courts under the arbitrary and capricious standard. That is the standard which all Circuit Courts of Appeals—including, in most instances, the Third Circuit—have applied in reviewing ERISA claims, and it is also the standard applied in reviewing claims arising under the Labor Management Relations Act of 1947 ("LMRA"). This Court has strongly emphasized that actions arising under ERISA were intended by Congress to arise in precisely the same way as actions arising under the LMRA. Requiring *de novo* review of certain ERISA claims while reviewing virtually identical LMRA claims under the arbitrary and capricious standard would impermissibly—and contrary to congressional intent—require such claims to arise differently in federal and state courts.

Finally, the Third Circuit's decision wrongly requires federal *and* state courts to determine, as a preliminary issue, whether an ERISA fiduciary has a conflict of interest in the context of a civil action for recovery of ERISA benefits. Congress expressly reserved to the *federal* courts jurisdiction of fiduciary conflict claims. § 502(e) of the Act, 29 U.S.C. § 1132(e). This Court should not permit an end-run around the jurisdictional barrier erected by Congress by permitting state courts to decide issues of fiduciary conflict under the pretext of evaluating a claim for recovery of ERISA benefits.

ARGUMENT

CONGRESS, AFTER THOROUGHLY BALANCING THE NEED FOR PROMPT AND FAIR ERISA CLAIMS REVIEW PROCEDURES AND THE PUBLIC INTEREST IN ENCOURAGING THE FORMATION OF EMPLOYEE BENEFIT PLANS, DEVELOPED A CAREFULLY-CRAFTED CIVIL ENFORCEMENT SCHEME WHICH WOULD BE SUBSTANTIALLY UNDERMINED IF THIS COURT ADOPTED THE *DE NOVO* STANDARD OF REVIEW ADVOCATED BY THE THIRD CIRCUIT IN *BRUCH v. FIRESTONE TIRE AND RUBBER CO.*; THE THIRD CIRCUIT SHOULD THEREFORE BE REVERSED AND THE DECISION OF THE DISTRICT COURT, WHICH APPLIED THE ARBITRARY AND CAPRICIOUS STANDARD IN REVIEWING THE DENIAL OF PLAINTIFFS' CLAIMS, SHOULD BE REINSTATED.

A. *De Novo* Review Impermissibly Tampers with ERISA's "Comprehensive" Remedial Scheme by Potentially Allowing Millions of ERISA Plan Participants and Beneficiaries to Challenge Anew Every Denial of Benefits under Employee Benefit Plans.

ERISA's "exclusive," "comprehensive civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, —— U.S. ——, 107 S.Ct. 1549, 1556 (1987).[2] Its

[2] By establishing "minimum standards and safeguards" for privately-funded and -administered ERISA plans, Congress sought to retain "the freedom of decision-making vital to [employee benefit] plans" and to "further[ ] . . . the growth and development" of such plans. 1974 U.S. Code Cong. & Admin. News at 4849-50. Rep. Ullman, one of ERISA's principal architects, emphasized that ERISA had been "carefully designed to provide adequate protection to employees" while simultaneously "provid[ing] a favorable setting for the growth and development" of private benefits plans. 3 Legislative History of the Employee Retirement Income Security Act of

" 'carefully integrated civil enforcement provisions found in § 502(a) [29 U.S.C. § 1132(a)] of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other [ERISA] remedies that it simply forgot to incorporate expressly.' " *Id.* at —, 107 S.Ct. at 1556 (*quoting Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (emphasis in original)). Notwithstanding this Court's repeated statements that the civil remedies available under ERISA are "exclusive" and "comprehensive," *Pilot Life, supra*, at ——, 107 S.Ct. at 1549, 1551, 1555, 1556, the Third Circuit, in *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1288 (1988), impermissibly " 'tamper[ed] with an enforcement scheme crafted [by Congress] with . . . evident care.' " *Pilot Life, supra*, at ——, 107 S.Ct. at 1556 (*quoting Russell, supra* at 147). Under the Third Circuit's holding, ERISA plan participants or beneficiaries may raise, in the first instance—before federal *and* state courts—questions concerning an ERISA fiduciary's alleged impartiality in the context of a civil action for recovery of benefits, even though ERISA contains no remedial or jurisdictional provision allowing them to do so.[3] Under the Third Circuit's ruling, if a court found that "no assurance of [a fiduciary's] impartiality" were present, *de novo* review of *every* civil claim for ERISA

1974, at 4673 (1976). He found it "axiomatic" that "plans cannot be expected to develop if costs are made overly burdensome." *Id.* at 4673 (1976). "[T]he entire statute is a finely tuned balance" between protecting benefits for employees" and "limiting the cost to employers." *A-T-O, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1021 (6th Cir. 1980).

[3] A civil action to recover ERISA plan benefits may be brought by a plan "participant or beneficiary" § 502(a)(1)(B) of the Act, 29 U.S.C. § 1132(a)(1)(B). Throughout the remainder of this brief, although only the right or capacity of a plan "participant" to bring such an action is discussed, it is understood that a plan "beneficiary" has the same right or capacity.

benefits could be required. *Bruch v. Firestone Tire and Rubber Company, supra*, 828 F.2d at 144.

The Third Circuit's decision, if upheld, could have a devastating effect on ERISA plan formation, extending far beyond the narrow confines of *Bruch*. Group life and health insurers provide insurance and claims services to *millions* of ERISA plan participants, many of whom file dozens of claims for benefits each year. Under the *Bruch* decision, every denial of benefits challenged by each and every one of those millions of participants could *potentially* require federal and state courts to conduct *de novo* review. No such result was ever intended under ERISA. The Third Circuit should therefore be reversed. Moreover, the decision of the District Court below, at 640 F. Supp. 519 (E.D. Pa. 1986)—which applied the arbitrary and capricious standard in reaching its conclusion, thereby precluding *de novo* review—should be reinstated.

The *Bruch* decision *can* be limited to its particular facts. Indeed, the Third Circuit attempted to do so when it defined the "rub" that caused it to conclude *de novo* review was required:

> . . . The "rub" is that the plan administrator is Firestone itself—which is also the sole source of funding for the plan at issue . . . .

Bruch, supra, 828 F.2d at 136. The problem comes from the Third Circuit's further explanation of this "rub." According to the Third Circuit, Firestone, as employer, plan fiduciary and administrator, presented "no *assurance* of . . . impartiality" in the processing of claims for benefits. *Id.* at 144 (emphasis added). In its effort to give substance to the alleged appearance of partiality, the Third Circuit observed that "every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Id.* The court reasoned that this lack of "assurance of . . . impartiality" required *de novo* review whenever it was present. *Id.* at 136, 144-45.

Thus, an ERISA plan participant could argue that he is entitled to *de novo* review under the *Bruch* decision if he can show that (1) the party denying his claim had fiduciary status under ERISA, and (2) there was no "assurance" that the fiduciary would be impartial in denying the participant's claim.

The *Bruch* decision, if upheld, *could* therefore affect the entire United States life and health insurance industries. This Court implicitly suggested in *Pilot Life* that insurance companies making claims determinations may be "fiduciaries" within the meaning of ERISA. *Id.* at ——, 107 S.Ct. at 1555-56.[4] Hence, the *potential* for an insurance company to meet the first prong of the *Bruch* test exists. To determine whether an insurance company could also possibly meet the second prong of that

[4] In discussing whether the plaintiff's state-law "bad faith" claim against an insurance company was preempted by ERISA in *Pilot Life*, *supra*, this Court noted, at ——, 107 S.Ct. at 1556, that

> Under the civil enforcement provisions of § 502(a) [29 U.S.C. § 1132(a)], a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of . . . an injunction against a plan administrator's improper refusal to pay benefits. A participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause of action may seek removal of the fiduciary. §§ 502(a)(2), 409 [29 U.S.C. § 1132(a)(2), 1109].

There has, however, been debate among the District Courts concerning the fiduciary status of insurance companies acting as insurers or claims processors for ERISA plans. *Compare Eaton v. D'Amato*, 581 F. Supp. 743, 745 (D.D.C. 1980) (suggesting that claims administrator of ERISA plan could be fiduciary within the meaning of ERISA if administrator had ultimate responsibility for claims determinations) *with Cate v. Blue Cross and Blue Shield*, 434 F. Supp. 1187, 1190 (E.D. Tenn. 1977) (holding that insurance policy was asset of ERISA plan and that insurance company, which merely paid claims with respect to that asset, was *not* fiduciary within meaning of ERISA; only named ERISA fiduciary, who presumably had control of plan assets, was fiduciary).

test—inability to provide "assurance" of impartiality—requires an examination of the services insurers render within the scope of ERISA.

Primarily, insurance companies render two types of services with respect to ERISA plans—they provide coverage under fully-insured plans, such as the plan at issue in *Pilot Life*, and they administer claims payment for employers who maintain self-funded plans, such as the plan at issue in *Light v. Blue Cross and Blue Shield*, 790 F.2d 1247 (5th Cir. 1986).

Under a fully-insured plan an insurer typically assumes a risk for a fee, then pays on that risk from a pool of funds. The greater the amount of money the insurer withdraws from the pool in claims payments, the less the insurer will make in profits on its assumed risk, and vice-versa.[5] Thus, the "rub" allegedly present for employers in *Bruch* may provide a tool to aggressive plaintiffs for use against insurance companies. A plan participant, on the strength of *Bruch*, could attempt to convince a court that "every dollar provided in benefits is a dollar spent by [the insurer]; and every dollar saved [by the insurer] is a dollar in [the insurer's] pocket." *See Bruch*, *supra*, 828 F.2d at 144.

Administrative services contracts do not involve an insurer's funds directly; rather, they involve the employer's funds. However, to the extent that renewal of an administrative services contract is assured by an employer's satisfaction with an insurer's distribution of his funds, the performance of administrative services could be characterized as something more than a disinterested activity. It is therefore possible for plan participants to

[5] Of course, the realities of the marketplace assure that companies that indiscriminately deny claims will fail to satisfy their clients and lose business; companies that pay claims promptly and fairly will satisfy their clients and attract business. The independent status and regulation of insurers by the marketplace substantially differentiates them from employers deciding whether or not to pay benefits under an unfunded plan.

argue that insurance companies—whether providing insurance or administering claims—are unable to provide the "*assurance* of . . . impartiality" necessary to avoid *de novo* review under *Bruch*.[6]

If the *Bruch* decision were given such a broad interpretation, every denial of benefits by an insurer under an ERISA plan—even the denial of a $2.00 claim for drugs which an insurer found to be "medically unnecessary"—could be subject to *de novo* review. And not only in federal courts—in state courts, too.[7] The cost of such review would be an enormous burden to the judicial system, insurers, and employers alike.[8] But in the end, the

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[6] However, even assuming *Bruch* were upheld, there are persuasive arguments to support the *non*-applicability of *Bruch* to many claims denials by insurers, one of which has been noted by the Third Circuit in *Shiffler v. Equitable Life Assurance Society*, 838 F.2d 78, 83 (1988) ("[W]e do not understand [the *Bruch*] case necessarily to apply in a situation . . . involving '*personal claims for benefits*,' *see Struble* [*v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325 (3d Cir. 1984)] at 333 . . ." where no issue of contract inerpretation affecting plan participants as a whole is raised (emphasis added)).

[7] The Third Circuit applies the *Bruch* test in the context of reviewing a claim for recovery of benefits. *Bruch v. Firestone Tire and Rubber Co., supra*, 828 F.2d at 136. Civil actions for recovery of benefits—whether pension benefits or fully-insured or insurer-administered benefits—are brought pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). State courts are provided with concurrent jurisdiction of all (a)(1)(B) claims—and *only* such claims—by § 502(e), 29 U.S.C. § 1132(e).

[8] For one thing, the *Bruch* standard may be incomprehensible, leading to great difficulty in application and requiring substantial litigation to achieve clarification. The Third Circuit itself appears to have questioned its status and intelligibility in *Shiffler v. Equitable Life Assurance Society, supra*, 838 F.2d at 83, n.7 ("We recognize that in *Bruch* the arbitrary and capricious standard was not applied *but we do not understand* that case *necessarily* to apply in a situation such as this involving 'personal claims for benefits,' [citation omitted] even though it could hardly be said that Equitable is disinterested in this matter" (emphasis added)). The Third Circuit has also lamented that the *Bruch* standard is "complex." *Eckersley v. WGAL TV, Inc.*, 831 F.2d 1204, 1208 (1987).

greatest cost would be borne by plan participants—the very parties Congress intended to protect. *De novo* review—with its attendant burdens of additional time and cost for private parties that fund plans—*destroys* the "careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans" that Congress worked so hard to achieve—and in fact, to date, *has* achieved. *See Pilot Life, supra*, at ——, 107 S.Ct. at 1556.[9]

Such a drastic result is not supported by the clear language of ERISA. Employers are permitted to provide ERISA benefits "*through the purchase of insurance* or otherwise . . . ." § 102(1), 29 U.S.C. § 1002(1). Applicable regulations anticipate that an insurer, in providing or processing claims for benefits under an ERISA plan, might be in a position similar to that which the Third Circuit characterized in the *Bruch* decision as giving rise to a potential conflict of interest.[10] While Con-

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[9] The Third Circuit off-handedly dealt with the cost issue by acknowledging that "deferring to [an] administrator's decision w[ould] make proceedings faster," but found that "the speed is attained by sacrificing the impartiality of the decisionmaker," resulting in "too great a cost." *Bruch v. Firestone Tire and Rubber Co., supra*, 828 F.2d at 144, n.10. This argument ignores the congressional intent shown by ERISA's careful balancing of competing interests and overlooks the express, detailed statutory safeguards highlighted by this Court in *Pilot Life, supra*, at ——, 107 U.S. at 1555-56, which Congress intended would provide explicit remedies in the event that a decisionmaker's impartiality rose to the level of an actionable breach under ERISA. Furthermore, this Court has recognized the value of alternate review procedures, comparable to those mandated by ERISA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) (lawsuits arising under the LMRA cannot be filed until internal collective bargaining procedures have been exhausted so as to "preserve[] the central role of arbitration in our 'system of industrial self-government.'" [Citation omitted]).

[10] The regulations, while acknowledging that benefits under an employee benefit plan may be provided or administered by insurance companies, nevertheless permit those companies to process claims

gress gave plan fiduciaries responsibility for implementing ERISA's mandatory internal review procedures, Department of Labor Regulations permit insurance companies to perform those procedures.[11] The procedures are *mandated* by section 503 of the Act, 29 U.S.C. § 1133. The Third Circuit's decision—despite the mandatory nature of ERISA's internal review procedures, which form the cornerstone of ERISA's comprehensive remedial scheme—renders that review meaningless in all cases where *de novo* review is required.[12] If the *Bruch* decision were given its broadest possible reading, the effectiveness of ERISA's mandated claim review procedures—which Congress *did* require— would therefore be greatly diminished, while *de novo* review— which Congress did *not* require— would burgeon, destroying ERISA's delicate balance of congressionally-recognized competing interests while unreasonably and unfairly burdening the courts.

B. While *De Novo* Review Destroys the Delicate Balance Among Competing Interests Congress Sought to Achieve, Application of the Arbitrary and Capricious Standard of Review to Civil Actions Arising Under ERISA Preserves that Balance.

The Third Circuit determined to require *de novo* review after rejecting application of the arbitrary and capricious standard. The District Court, at 640 F. Supp. 519 (E.D. Pa. 1986), had applied the "arbitrary and capricious" standard in reviewing the *Bruch* plaintiffs' claim. Under the arbitrary and capricious standard, *de novo* review is

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for benefits, while imposing an obligation on insurers to provide notice of their claims determinations and a reasonable opportunity for review. 29 C.F.R. § 2560.503-1(c), (g)(2).

[11] *See* brief, n.10, *supra*.

[12] *De novo* review could encourage plan participants to hold back information which might have enabled an internal reviewer—including an insurance company—to favorably assess a participant's claim, in the hope of submitting that information later and obtaining a more sympathetic result from a court.

precluded. *See, e.g., Brandon v. Metropolitan Life Ins. Co.*, 678 F. Supp. 650, 655 (E.D. Mich. 1988) ("*de novo* factual hearing of the claimant's eligibility for benefits" is not permitted under arbitrary and capricious standard). Application of the arbitrary and capricious standard therefore avoids the circumvention of ERISA's carefully-crafted remedial scheme that *de novo* review would encourage. It preserves the delicate balance between competing interests that Congress sought to achieve.[13] Thus, while the Third Circuit's decision to require *de novo* review should be reversed, the decision of the District Court, which applied the arbitrary and capricious standard of review, should be reinstated.

The District Court below, in applying the arbitrary and capricious standard, followed the lead of every other Circuit Court of Appeals to address the appropriate standard of review under ERISA—*see, e.g., Jestings v. New England Telephone & Telegraph Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *Miles v. New York State Teamsters Conference Pension & Retirement Employee Benefit Plan*, 698 F.2d 593, 599 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); *LeFebre v. Westinghouse Electric Corp.*, 747 F.2d 197, 204 (4th Cir. 1984); *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979); *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149-50 (6th Cir. 1985); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 823-24 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812, 814-15 (8th Cir. 1988); *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648,

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[13] It also allows courts to promptly decide cases before them on motion for summary judgment, since additional fact finding is not permitted, thereby affording the prompt claims settlement Congress sought to provide. *See, e.g., Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 (1st Cir. 1988); *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 455, 457 (6th Cir. 1984).

654 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Carter v. Central States Southeast & Southwest Areas Pension Fund*, 656 F.2d 575, 576 (10th Cir. 1981); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984); *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982). It even followed what had been the lead of the Third Circuit—*see Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325, 333 (1984)—and may well have struck closer to the current inclination of the Third Circuit as expressed in *Shiffler v. Equitable Life Assurance Society*, 838 F.2d 78, 83 (1988)—the Circuit's leading post-*Bruch* decision to discuss the applicable standard of review—than did the Third Circuit in *Bruch*.

The District Court properly found, under the arbitrary and capricious standard, that "where the terms of [a] policy are susceptible to more than one *reasonable* interpretation, ERISA mandates that the court not substitute its judgment for that of the [plan] administrator." *Bruch v. Firestone Tire and Rubber Co.*, 640 F. Supp. 519, 524 (E.D. Pa. 1986) (emphasis added). It also noted that "case law support[ed] Firestone's interpretation of the Termination Pay Plan" there at issue, *id.* at 525—the same interpretation which led the Third Circuit to require *de novo* review because, allegedly, Firestone's administrator could not "assure" his impartiality in having reached an identical conclusion.

The District Court framed the arbitrary and capricious standard in a way similar to that of many of the United States Courts of Appeals. While the standard has been described by the Circuits in differing terms, it has perhaps been given its simplest and clearest expression in *Jestings v. New England Telephone & Telegraph Co.*, 757 F.2d 8 (1st Cir. 1985). There, the First Circuit noted that

> "[w]here both the trustees of a pension fund and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretation must be allowed to control." *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Benefit Plan*, 698 F.2d 593, 601 (2d Cir.), *cert. denied* [464] U.S. [829], 104 S.Ct. 105, 78 L.Ed.2d 108 (1983); *see also Ponce v. Construction Laborers Pension Trust for Southern California*, 628 F.2d [537] at 542 [(9th Cir. 1980)] ("It is for the trustees, not judges, to choose between various reasonable alternatives."); *cf. Palino v. Casey*, 664 F.2d 854, 858 (1st Cir. 1981) ("In judging the actions taken by trustees in the course of managing an employment benefit plan, our inquiry is limited to determining whether the actions were arbitrary and capricious in light of the trustees' responsibility to all potential beneficiaries."); *Rueda v. Seafarers International Union of North America*, 576 F.2d 939, 942 (1st Cir. 1978) ("Unless the trustees interpretation of the plan is arbitrary and capricious, or without rational basis, it may not be disregarded").

Jestings v. New England Telephone & Telegraph Co., supra, 757 F.2d at 9 (*quoting Govoni v. Bricklayers, Masons and Plasterers International Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984)). Under this phrasing of the standard, as in the decision of the District Court below, rationality is the key. Despite this, the Third Circuit erroneously characterized the standard as "outcome determinative." *Bruch v. Firestone Tire and Rubber Co., supra*, 828 F.2d at 147. It is not. A plaintiff may recover benefits under the arbitrary and capricious standard by showing that any particular denial of benefits lacked a rational basis. *Jestings v. New England Telephone & Telegraph Co., supra*, 747 F.2d at 9. The *Bruch* plaintiffs simply failed to do so.

In rejecting application of the arbitrary and capricious standard despite the weight of judicial precedent in its favor, the Third Circuit acknowledged, as it should have, that the standard has been applied in the context of reviewing ERISA claims denials because it is used in re-

II. THE COURT OF APPEALS' BROAD CONSTRUCTION OF THE TERM "PARTICIPANT" HAS NO BASIS IN THE STATUTE.

The court of appeals held that a plan administrator is required under ERISA to provide information to former employees, even if they are not eligible and have no reasonable expectation of becoming eligible for plan benefits. The court reached this result by interpreting the statutory definition of "participant" as including persons "who claim to be but in fact are not" entitled to a benefit under an ERISA-regulated plan. Pet. App. A42. This interpretation is without support in the statute.

ERISA defines "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from any employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

"The term participant is of considerable importance within ERISA's statutory scheme because numerous rights under that scheme are limited to those who are included within that term." *Saladino* v. *I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985). A participant must be sent certain plan documents at specified times and intervals (29 U.S.C. § 1024(b)(1)); may examine plan documents at any time at specified locations (*id.* § 1024(b)(2)); must be sent financial information on an annual basis (*id.* § 1024(b)(3)); must be sent copies of plan documents on request (*id.* § 1024(b)(4)); and must be sent information as to his accrued and nonforfeitable benefits on request once a year (*id.* § 1025(a)). In addition, a participant may institute a civil action to enforce his rights under ERISA (*id.* § 1132(a)); and may be entitled to attorneys' fees (*id.* § 1132(g)).

This case involves Section 502(c) of ERISA, 29 U.S.C. § 1132(c), which provides that a participant may recover penalties from a plan administrator for failure to respond in timely fashion to the participant's request for information. Section 502(c) states in pertinent part:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant . . . by mailing the material requested . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal. . . .

In the district court, respondents sought damages under Section 502(c), alleging that the plan administrator failed to respond properly to their requests for information. The district court held that, because respondents were not entitled to benefits under any of Firestone's plans, they were not "participants" and thus could not assert a right to receive information concerning those plans. Pet. App. A69-A72.

In reversing the district court, the court of appeals read the language "any . . . former employee who . . . *may*

become eligible to receive a benefit," in the statutory definition of "participant," 29 U.S.C. § 1002(7) (emphasis added), as equivalent to "*someone who claims to be*" eligible to receive a benefit (Pet. App. A41 (court's emphasis)).

Congress could not possibly have intended this result. The words "may become eligible," in their ordinary, natural sense, refer to someone who, based on present circumstances and activities, has the opportunity to gain eligibility. In the practical application of employee benefit plans, this means someone who would be expected to attain eligibility by virtue of the passage of time, assuming that the underlying circumstances remain unchanged. This would include all present employees and those former employees who have worked for the minimum period specified in the plan but have not attained the necessary age to receive benefits. *See Nugent* v. *Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980). A former employee who has no right under a particular plan to attain eligibility in the future simply does not fit within the definition of "participant," because he is not "eligible" for benefits nor is he in a position in which he "may become eligible" for benefits.

Furthermore, Congress could not have meant to require an employer to continue to send information, on a continuing basis, to all former employees, and to respond to specific requests for individualized information from former employees where those former employees have not stated a colorable claim for benefits. Yet that is the result of the court of appeals' broad reading of "participant" as including an individual "even if he is no longer an employee and is not entitled to any benefits other than those he has already received." Pet. App. A3.

As the Second Circuit has concluded, any interpretation of "participant" that would broadly include an amorphous group consisting of all former employees who merely "claim" entitlement to benefits cannot be reconciled with the statutory scheme:

> The mandatory requirement that plans send certain documents at specified intervals and annual financial information to participants strongly suggests that this group must be easily identifiable and one with a substantial interest in the matters conveyed. . . . Similarly, the provision that the plans inform participants who so request of their accrued and nonforfeitable benefits implies that the persons entitled to such disclosure have a demonstrable claim. We believe, therefore, that Congress intended the term participant to limit the various reporting and disclosure obligations imposed on plans to identifiable persons with a substantial interest in the matters conveyed and not to burden plans with the cost of reporting and disclosing to an amorphous, undefined group of individuals who lack any such interest. Any other reading of the statute would reduce the amounts available to actual beneficiaries of plans for no statutory purpose.

Saladino v. *I.L.G.W.U. National Retirement Fund*, 754 F.2d at 476.

In enacting ERISA, Congress recognized the voluntary nature of private benefit plans, and therefore sought to minimize the financial burdens to be placed on the system by the additional statutory requirements. *See, e.g.* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1 (1973); 120 Cong. Rec. 4295 (1974) (remarks of Rep. Ullman). The decision below,

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No. 87-1054

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., *et al.*,
Petitioners,

v.

RICHARD BRUCH, ALBERT SCHADE,
LEONARD A. SMOLINSKI, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF FOR THE ERISA INDUSTRY COMMITTEE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

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INTRODUCTION

This case presents two issues of importance under the Employee Retirement Income Security Act of 1974 ("ERISA"). The first issue concerns the standard of review to be applied by a court in reviewing a fiduciary's denial of benefits under an unfunded employee benefit plan regulated by ERISA. The court below held that, even in the absence of any evidence of bias, the reviewing court must apply a *de novo* standard of review, thereby rejecting the view of every other court of appeals that a fiduciary's decision may be reviewed only for arbitrary and capricious conduct. The

second issue concerns the proper scope of the term "participant" as defined in ERISA, a term that identifies a class of persons to whom the administrator must, under threat of penalty, provide detailed information about the benefit plan. The court of appeals construed this term broadly and concluded that plan administrators must provide information concerning the plan to all persons who claim benefits, even if they have no colorable or prospective right to benefits. The resolution of both issues is of great significance to employers who maintain employee benefit plans regulated by ERISA and to employees who rely on these plans.

The ERISA Industry Committee ("ERIC") files this brief *amicus curiae*, with the consent of the parties,[1] in support of petitioners' positions (1) that, absent a showing of bias in fact, a reviewing court must apply the arbitrary and capricious standard of review in an action challenging a denial of benefits; and (2) that the term "participant" is limited to present employees and to former employees who are eligible, or whose present circumstances indicate that they may become eligible, for benefits under a plan regulated by ERISA.

THE INTEREST OF THE *AMICUS CURIAE*

ERIC is a nonprofit association of more than one hundred corporations doing business in a wide variety of United States industries. A list of ERIC's members is set forth in the appendix to this brief.

ERIC's membership comprises a broad cross-section of major firms that maintain pension and welfare plans for their employees. All of ERIC's members do business in

[1] The parties' written consents have been filed with the Clerk of the Court.

more than one state, and some members maintain pension and welfare plans that provide benefits to employees in all fifty states. Most, if not all, of ERIC's members maintain unfunded, employer-administered plans like the one involved in this case. Moreover, the logic of the court of appeals' decision on the "standard of review" issue extends beyond plans that are unfunded and employer-administered, and encompasses plans such as defined benefit pension plans, in which employer contributions are based on benefits expected to become payable.[2] Virtually all of ERIC's members maintain defined benefit pension plans.

Millions of persons are covered by ERISA-governed employee benefit plans. Most claims for benefits made under these plans are granted without controversy. Inevitably, however, some claims are disputed, and some disputed claims result in litigation. Although the litigated cases represent a minute percentage of the aggregate number of claims filed, most of ERIC's members are involved in benefit claim litigation each year. Because imposition of a *de novo* standard of review to benefit claim suits would result in a significant increase in the number and complexity of such suits, ERIC's members have a substantial interest in the resolution of the "standard of review" issue.

In addition, because many of the rights provided by ERISA are available only to plan "participants," this term is of central importance in the administration and enforcement of the statute. The requirement of ERISA that plan administrators disclose to plan participants substantial information about the plan is one of the important provisions of ERISA whose scope depends on the interpretation of this word. Certain types of information must be disclosed to participants as a matter of course on a continuing basis.

[2] *See* p. 13, *infra*.

Plan administrators may be held personally liable to pay substantial damages for the failure or refusal to supply requested information to a participant. All of ERIC's members are subject to the disclosure obligations of ERISA and are subject to suit by participants. Accordingly, ERIC's members have a substantial interest in the resolution of the "participant" issue.

SUMMARY OF ARGUMENT

I.

The language and legislative history of ERISA demonstrate that Congress intended the deferential "abuse of discretion" standard to apply to review of a fiduciary's discretionary actions with respect to a benefit plan. It is beyond question that Congress meant the discretionary actions of plan fiduciaries, including benefit determinations, to be governed by common law trust principles. It is an established rule of trust law that a trustee's discretionary actions are reviewable only for an abuse of discretion, to correct an arbitrary and capricious exercise of the trustee's authority.

That Congress intended this deferential standard to apply is confirmed by the fact that the ERISA enforcement scheme was patterned after that of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 141 *et seq.* At the time of ERISA's enactment, Congress was aware that, in reviewing trustees' actions under a similarly worded provision of the LMRA, the courts had for many years employed the "arbitrary and capricious" standard that had been developed under the law of trusts.

Because the benefit plan in this case is employer-administered, the court of appeals applied a "presumption

of partiality" to the administrator's decision. The court reasoned that such a presumption was required in view of the conflict of interest arising from the administrator's financial stake in the outcome of every benefit determination. However, the law of trusts recognizes no such presumption where the settlor of a trust was aware of the conflict of interest but nevertheless conferred discretionary power on the trustee.

Like the settlor of a common law trust, Congress was aware of the potential conflict of interest when it drafted Section 408(c)(3) of ERISA, 29 U.S.C. § 1108(c)(3), which expressly permits "an officer, employee, agent, or other representative" of an employer to serve as a fiduciary. Congress also drafted the statute to apply the usual rules of trust law to the fiduciary's conduct. There is thus no basis in the statute for applying a different standard of review in the case of decisions by fiduciaries who also are representatives of an employer sponsoring a plan.

By requiring *de novo* review of benefit decisions under a large number of plans, the decision below will have a burdensome impact on the courts and on benefit plans. There is no justification for imposing such costs, particularly since the abuse of discretion standard is sufficiently flexible to protect plan participants and beneficiaries from possible bias by the fiduciary.

II.

Contrary to the decision below, Congress could not conceivably have intended the term "participant" to include former employees who have no colorable claim to benefits under a benefit plan. The court erroneously read the language "any . . . former employee . . . who *may become eligible* to receive a benefit" in the statutory definition as

equivalent to "someone who *claims* to be eligible to receive a benefit." Pet. App. A41.

The words "may become eligible" refer to someone who, based on his present circumstances and activities, would be expected to attain eligibility by virtue of the passage of time, assuming that his underlying circumstances remain unchanged. The decision below, by requiring employers to disclose plan information on a continuing basis and for an unlimited time to any and all former employees, would impose upon benefit plans increased costs that Congress could not have contemplated when it enacted the statute.

In support of its holding, the court of appeals noted that ERISA's enforcement provision states that an action may be brought by a "participant." The court reasoned that, because anyone who claims to be a "participant" would have standing to sue under ERISA, anyone who claims to be eligible for benefits should have the right to receive plan information. This conclusion falls of its own weight, since an individual cannot maintain an action under ERISA merely by asserting, without support, that he is a "participant."

As a practical matter, plan administrators tend to provide plan information to individuals who appear to have a colorable claim to benefits. The danger of the decision below, however, is that it would impose significant costs by requiring the disclosure of individualized information to virtually anyone requesting it, even to a person who has long since left the covered employment and has no arguable claim of entitlement to benefits. Congress certainly did not intend such a result.

ARGUMENT

I. IN ENACTING ERISA, CONGRESS INTENDED THE ABUSE OF DISCRETION STANDARD TO GOVERN REVIEW OF BENEFIT DECISIONS BY PLAN FIDUCIARIES.

The court of appeals has held that the *de novo* standard of review must be applied in reviewing the denial of benefits whenever a plan administrator has a potential conflict of interest. This holding is contrary to the clear intent of Congress in enacting ERISA.

A. Congress Codified The Common Law Of Trusts In ERISA To Govern The Actions of Fiduciaries And Judicial Review Of Those Actions.

Under ERISA, a fiduciary of a benefit plan has broad discretion to manage the operation of the plan, including the authority to "determin[e] the eligibility of claimants." *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2216 (1987); *see also Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 (1985); *id.* at 152-153 & n.8 (Brennan, J., concurring). Section 402 of ERISA provides that one or more "named fiduciaries" of a benefit plan "shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a)(l). This authority plainly includes the authority to make claims decisions, as ERISA further provides that a "full and fair review" of a claim denial shall be made "by the appropriate named fiduciary." *Id.* § 1133(2). The statute expressly permits an employer's representative to serve as a plan fiduciary. *Id.* § 1108(c)(3).

Both the language and history of ERISA make clear that the discretionary actions of a fiduciary in managing a benefit plan are to be governed by principles developed in

the law of trusts. "Congress invoked the common law of trusts to define the general scope of [a fiduciary's] authority and responsibility." *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985). The statute provides a set of substantive standards to which a fiduciary must adhere in his administration of a plan. *See* 29 U.S.C. § 1106(b).

In addition, the manner in which a fiduciary's powers may be exercised "is further defined in the statute through the provision of strict standards of trustee conduct, also derived from the common law of trusts — most prominently, a standard of loyalty and a standard of care." *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. at 570. The standard of care, set forth in the so-called "prudent man rule," provides that in carrying out his duties, a plan fiduciary shall exercise "the care, skill, prudence, and diligence" of a "prudent man acting in like capacity." 29 U.S.C § 1104(a)(l)(B). The standard of loyalty, embodied in the "exclusive benefit" rule, provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of providing benefits to participants and their beneficiaries." *Id.* § 1104(a)(l)(A)(i).

As Justice Brennan pointed out in his concurring opinion in *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. at 156-157, "ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme . . . ." One of the established principles of trust law is that a trustee's discretionary actions are subject to review only for an abuse of discretion.

> Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

Restatement (Second) of Trusts § 187 (1959). *See also*, G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 560, at pp. 196-208 (2d ed. 1980); III A. Scott, *The Law of Trusts* § 187, at pp. 14-19 (4th ed. 1988).

Congress modeled ERISA's civil enforcement scheme on that of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 141 *et seq. See Pilot Life Ins. Co.* v. *Dedeaux*, 107 S. Ct. 1549, 1555-1558 (1987). Section 302(c)(5) of the LMRA, which governs union-administered benefit plans to which employers make contributions, provides that plan assets are to be "held in trust" and that the trustees are to act "for the sole and exclusive benefit of the employees." 29 U.S.C. § 186(c)(5). For many years prior to the incorporation of this same language in ERISA, the courts had applied a deferential standard, referred to either as an "abuse of discretion" standard or as an "arbitrary and capricious" standard, in reviewing trustees' actions under Section 302(c)(5) of the LMRA.[3] Congress is presumed to have known, at the time of ERISA's enactment, of the deferential standard of review under the common law of trusts and under the LMRA.[4]

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[3] *See, e.g., Kosty* v. *Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 364 (1964); *Gomez* v. *Lewis*, 414 F.2d 1312, 1313-1314 (3d Cir. 1969); *Insley* v. *Joyce*, 330 F. Supp. 1228, 1233-1234 (N.D. Ill. 1971). *See also*, Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duquesne L. Rev. 1033, 1037-1041 (1985).

[4] *See, e.g., Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 319 (1983), *quoting from Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("We may presume that our elected representatives, like other citizens, know the law").

When Congress incorporated into ERISA the same "exclusive benefit" standard that had governed the discretionary actions of trustees under the common law of trusts and under the LMRA, it was aware that such discretionary actions were reviewable only to correct abuses of the trustees' discretion. By using this language, therefore, Congress undoubtedly also intended to apply the same deferential standard of review that had long been applicable under trust law and under the LMRA.

B. Under Trust Law, The Courts Apply An Abuse Of Discretion Standard Of Review Absent Evidence Of An Actual Conflict Of Interest.

In rejecting the abuse of discretion standard in favor of a *de novo* standard of review, the court of appeals in effect invoked a presumption of partiality against the fiduciary.[5] However, the common law of trusts, which Congress incorporated into ERISA, recognizes no such presumption.

Under the common law, it is well established that application of the abuse of discretion standard of review is appropriate, despite the existence of a conflict of interest, where the settlor of the trust was aware of the conflict but nonetheless conferred discretionary power on the trustee. *See, e.g., Childs v. National Bank of Austin*, 658 F.2d 487, 490 (7th Cir. 1981). When a trustee cannot carry out the purpose of the trust without being subject to a conflict of interest, "it may fairly be assumed that such [conflict] was contemplated by the testator." *Boston Safe Deposit & Trust Co. v. Lewis*, 317 Mass. 137, 57 N.E.2d 638, 640 (1944). In such a situation, where the settlor has sanctioned the conflict, "there is no presumption against the fiduciary based on his acting, despite divided loyalty, in the intended transaction." *Goldman v. Rubin*, 292 Md. 693, 441 A.2d 713, 724 (1982).

In light of these principles, the court of appeals plainly erred in concluding that the named fiduciary of an ERISA plan must be presumed to have acted pursuant to an improper motive simply because of the existence of the conflict of interest that arises when the plan in question is both "employer-administered" and "unfunded." Congress here, in enacting ERISA, was well aware that a large number of benefit plans are subject to the conflict of interest that the court of appeals relied on. Congress nevertheless drafted the statute to apply the usual rules of trust law to the fiduciary's conduct.

As previously noted, ERISA contains a series of substantive standards, derived from trust law, that govern the conduct of a fiduciary in administering a plan. One of those standards, set forth in Section 406(b)(2), prohibits a fiduciary, "in any transaction involving the plan," from acting on behalf of, or from representing, any party "whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2). At the same time, however, Section 408(c)(3) provides that nothing in Section 406 "shall be construed to prohibit any fiduciary from serving as a fiduciary in addition to being an

[5] The court reasoned as follows:

> In the unfunded pension plan at issue in Count I of the complaint in this case . . . there is no assurance of the trustee's impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer, and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket.

Pet. App. A21-A22

officer, employee, agent, or other representative of a party in interest." *Id.* § 1108(c)(3).[6]

Like the settlor of a common law trust, therefore, Congress was aware of the potential conflict of interest, and yet left the usual rules in the statute. The existence of that conflict accordingly cannot serve as a basis for deviating from the traditional abuse of discretion standard without substantially impairing the Congressional design.[7]

C. The Abuse of Discretion Standard Is Sufficiently Flexible To Protect Plan Participants And Beneficiaries From Bias In the Fiduciary's Decision.

The decision below is quite broad in scope and would require an increasing expenditure of judicial resources in reviewing routine decisions by plan administrators under a large number of benefit plans. Unless the decision below is overturned, more disappointed claimants will be encouraged to challenge adverse decisions, so that the number of cases seeking review of benefit decisions is likely to increase dramatically. Moreover, under the court's reasoning, a presumption of partiality would apply not only in the case of unfunded plans that are administered by the employer, but also to the vast majority of other plans, such as "defined

[6] *See also,* H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 312 (1974) ("The substitute also makes it clear that a party-in-interest may serve as a fiduciary in addition to being an officer, employee, agent or other representative of a party in interest."). The term "party in interest" is defined in the statute to include, with respect to an employee benefit plan, "an employer any of whose employees are covered by such plan." 29 U.S.C. § 1002(14)(C).

[7] The Second Circuit recognized this principle in *Morse v. Stanley,* 732 F.2d 1139, 1142 (2d Cir. 1984), when it refused to apply a presumption of partiality based on the fact that plan trustees were also members of the company's senior management.

benefit" plans, in which the amount of the employer's contribution is based upon the level of benefits expected to be payable.[8]

The court of appeals itself recognized, however, that the traditional standard of review, whether termed "abuse of discretion" or "arbitrary and capricious," is a flexible one that the courts have tailored to the particular circumstances in reviewing decisions by fiduciaries of ERISA benefit plans. *See* Pet. App. A11-A13. Thus, when the evidence indicates the possibility of bias in fact, the courts will show less deference and will engage in a more searching inquiry of the fiduciary's decision.

For example, in *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir. 1984), *cert. denied,* 474 U.S. 865 (1985), the evidence showed that the employer-administrator had "actively concealed" the plan from employees and had failed to meet any of ERISA's procedural requirements. *Id.* at 1352. Although the court applied the arbitrary and capricious standard, it closely scrutinized the administrator's

[8] The concerns that motivated the court of appeals to impose these additional costs on benefit plans and on the courts are unfounded. From a practical standpoint, the presumption of partiality applied by the court below makes little, if any, sense. As the Seventh Circuit observed in discussing the Third Circuit's decision in this case:

> Yet even in such a case, [*i.e.*, where the plan is unfunded and employer-administered] the impact on the company's welfare of granting or denying an individual application for a pension will usually be too slight to compromise the impartiality of the trustees, even if all are appointed by the company. Nor is it in a company's long-run best interest to alienate employees by dealing unfairly with pension claims.

Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1053 (7th Cir. 1987).

benefits decision in light of the "continuing procedural violations." *Id.* at 1354.[9]

The same approach was applied in *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), in circumstances quite similar to those of this case. In *Jung*, FMC sold one of its divisions to a different company. The new owner agreed, as part of the sale, to offer employment to all salaried employees of the division at comparable salaries and to provide a comparable level of benefits. *Id.* at 709. The plaintiffs, suing on behalf of a class of all salaried employees of the former FMC division, sought severance pay benefits from FMC. The court refused to apply a standard of review other than the traditional arbitrary and capricious standard. *Id.* at 711. It concluded, however, that, where the administrator's decision denying benefits to a class "avoids a substantial outlay, the reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision." *Id.* at 711-712.

In *Dockray* v. *Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986), the court noted that the decision of the plan administrator denying benefits had been made during the course of "an unusually bitter and violent" strike, *id.* at 1152, and that the applicant for benefits had been a consistent supporter of the strike. *Id.* at 1150. In view of the "highly charged atmosphere," the court concluded that, in

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[9] The court explained:

> [I]n reviewing an administrator's decision, a court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary and capricious. We hold that the type of plan administration practiced by Del Monte is highly probative of whether a particular decision to deny benefits was infected by its having been made in conformity with the objectionable scheme.

applying the arbitrary and capricious standard, it was "unrealistic to grant the same substantial deference to the consideration of [the claimant's] application by an administrator who is also a senior member of [company] management as we would the decision of a wholly independent fund trustee in similar circumstances." *Id.* at 1153. Other courts of appeals have endorsed this flexible application of the arbitrary and capricious standard. *See, e.g., Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1148-1149 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Anderson* v. *Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-1521 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985).

These cases demonstrate that

> flexibility in the scope of judicial review need not require a proliferation of different standards of review; the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees' decisions — more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is.

Van Boxel v. *Journal Company Employees' Pension Trust*, 836 F.2d 1048, 1052-1053 (7th Cir. 1987) (citation omitted). The Seventh Circuit refused to follow the approach put forward by the Third Circuit in this case: "Flexibly interpreted, the arbitrary and capricious standard . . . allows the reviewing court to make the necessary adjustments for possible bias in the trustees' decision. So there is no urgent need to throw it overboard and cast about for an alternative verbalization." *Id.* at 1053.

II. THE COURT OF APPEALS' BROAD CONSTRUCTION OF THE TERM "PARTICIPANT" HAS NO BASIS IN THE STATUTE.

The court of appeals held that a plan administrator is required under ERISA to provide information to former employees, even if they are not eligible and have no reasonable expectation of becoming eligible for plan benefits. The court reached this result by interpreting the statutory definition of "participant" as including persons "who claim to be but in fact are not" entitled to a benefit under an ERISA-regulated plan. Pet. App. A42. This interpretation is without support in the statute.

ERISA defines "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from any employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

"The term participant is of considerable importance within ERISA's statutory scheme because numerous rights under that scheme are limited to those who are included within that term." *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985). A participant must be sent certain plan documents at specified times and intervals (29 U.S.C. § 1024(b)(1)); may examine plan documents at any time at specified locations (*id.* § 1024(b)(2)); must be sent financial information on an annual basis (*id.*

§ 1024(b)(3)); must be sent copies of plan documents on request (*id.* § 1024(b)(4)); and must be sent information as to his accrued and nonforfeitable benefits on request once a year (*id.* § 1025(a)). In addition, a participant may institute a civil action to enforce his rights under ERISA (*id.* § 1132(a)); and may be entitled to attorneys' fees (*id.* § 1132(g)).

This case involves Section 502(c) of ERISA, 29 U.S.C. § 1132(c), which provides that a participant may recover penalties from a plan administrator for failure to respond in timely fashion to the participant's request for information. Section 502(c) states in pertinent part:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant . . . by mailing the material requested . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal. . . .

In the district court, respondents sought damages under Section 502(c), alleging that the plan administrator failed to respond properly to their requests for information. The district court held that, because respondents were not entitled to benefits under any of Firestone's plans, they were not "participants" and thus could not assert a right to receive information concerning those plans. Pet. App. A69-A72.

In reversing the district court, the court of appeals read the language "any . . . former employee who . . . *may*

become eligible to receive a benefit," in the statutory definition of "participant," 29 U.S.C. § 1002(7) (emphasis added), as equivalent to "*someone who claims to be*" eligible to receive a benefit (Pet. App. A41 (court's emphasis)).

Congress could not possibly have intended this result. The words "may become eligible," in their ordinary, natural sense, refer to someone who, based on present circumstances and activities, has the opportunity to gain eligibility. In the practical application of employee benefit plans, this means someone who would be expected to attain eligibility by virtue of the passage of time, assuming that the underlying circumstances remain unchanged. This would include all present employees and those former employees who have worked for the minimum period specified in the plan but have not attained the necessary age to receive benefits. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980). A former employee who has no right under a particular plan to attain eligibility in the future simply does not fit within the definition of "participant," because he is not "eligible" for benefits nor is he in a position in which he "may become eligible" for benefits.

Furthermore, Congress could not have meant to require an employer to continue to send information, on a continuing basis, to all former employees, and to respond to specific requests for individualized information from former employees where those former employees have not stated a colorable claim for benefits. Yet that is the result of the court of appeals' broad reading of "participant" as including an individual "even if he is no longer an employee and is not entitled to any benefits other than those he has already received." Pet. App. A3.

As the Second Circuit has concluded, any interpretation of "participant" that would broadly include an amorphous group consisting of all former employees who merely "claim" entitlement to benefits cannot be reconciled with the statutory scheme:

> The mandatory requirement that plans send certain documents at specified intervals and annual financial information to participants strongly suggests that this group must be easily identifiable and one with a substantial interest in the matters conveyed. . . . Similarly, the provision that the plans inform participants who so request of their accrued and nonforfeitable benefits implies that the persons entitled to such disclosure have a demonstrable claim. We believe, therefore, that Congress intended the term participant to limit the various reporting and disclosure obligations imposed on plans to identifiable persons with a substantial interest in the matters conveyed and not to burden plans with the cost of reporting and disclosing to an amorphous, undefined group of individuals who lack any such interest. Any other reading of the statute would reduce the amounts available to actual beneficiaries of plans for no statutory purpose.

Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d at 476.

In enacting ERISA, Congress recognized the voluntary nature of private benefit plans, and therefore sought to minimize the financial burdens to be placed on the system by the additional statutory requirements. *See, e.g.*, H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1 (1973); 120 Cong. Rec. 4295 (1974) (remarks of Rep. Ullman). The decision below,

by requiring disclosure of plan information for an unlimited period of time to any and all former employees, would result in increased costs to benefit plans far beyond those contemplated by Congress in enacting the statute or by employers in establishing benefit plans.

The decision below also is at odds with pertinent regulations promulgated by the Department of Labor, the agency authorized to enforce ERISA and to monitor compliance with its disclosure provisions. Under these regulations, an individual is no longer a "participant" when he becomes "ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur." 29 C.F.R. § 2510.3-3(d)(2)(i)(A) (1987). Similarly, the regulations exclude from the definition of "participant" an individual who has incurred a one-year break in service prior to which he had acquired no vested right to a benefit; such an individual is not a participant until he has completed a year of service after returning to employment covered by the plan. *Id.* § 2510.3-3(d)(3)(i). Although these regulations are entitled to considerable deference in interpreting the statute, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the court of appeals failed to consider them when it promulgated its own interpretation.

The court of appeals sought to justify its expansive definition of "participant" by referring to ERISA's civil enforcement provision, which states that a civil action may be brought by a "participant." 29 U.S.C. § 1132(a)(1).[10] The court expressed the view that any individual "*who claims to be* a participant" would have standing to bring an

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[10] The requirement that the plaintiff be a plan participant implicates both standing and subject matter jurisdiction requirements. *See, e.g.*, *Saporito* v. *Combustion Engineering, Inc.*, 843 F.2d 666, 671 (3d Cir. 1988); *Stanton* v. *Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986).

action. Pet. App. A41 (court's emphasis), and it reasoned that, in similar fashion, anyone "who claims to be" eligible to receive plan benefits should have the right to receive information concerning the plan. This approach is fatally flawed.

Contrary to the assumption of the court of appeals, it is not enough for an individual merely to assert, without support, that he is a participant in order to maintain an action under ERISA against a plan administrator. Indeed, the Third Circuit itself recently held that former employees did not qualify as "participants," and thus did not have standing to pursue their claims under a particular benefit plan, because they had received a lump-sum payment of all the benefits to which they were entitled under the plan. *Saporito* v. *Combustion Engineering, Inc.*, 843 F.2d 666, 671 (3d Cir. 1988). The court of appeals' decision in *Saporito* undercuts its conclusion in this case that a person can qualify as a "participant" and can maintain an action under ERISA simply by claiming an entitlement to benefits "even if he is no longer an employee and is not entitled to benefits other than those he has already received." Pet. App. A3.

In short, a plaintiff must properly allege and prove that he is a "participant" in order to maintain an action under ERISA. The court of appeals' circular approach — that a "participant" is any person who claims to be one — begs the question of who is a "participant" and renders the statutory definition superfluous.

The court of appeals also purported to rely on ERISA's legislative history in support of its expansive definition of "participant." Pet. App. A43. The court noted that the Senate Report states that the reporting and disclosure

requirements of the statute were meant to assure "that individual *participants* . . . will be armed with enough information to enforce their own rights . . . " S. Rep. No. 93-127, 93d Cong., 1st Sess. 27 (1973) (emphasis added). But this statement confirms that Congress intended to limit disclosure to "participants" with "rights" under the plan. Here, again, the court of appeals' approach begs the question of who is a "participant."

By limiting the obligation to disclose plan information only to "participants," Congress must have contemplated that, if a former employee's written request for plan information shows on its face that his circumstances would not entitle him to benefits, the administrator need not provide the requested information. Similarly, where a former employee submits a request without supplying information concerning his employment history but the company's own records demonstrate that the individual is not eligible and will not become eligible for benefits, there is no basis in the statute for placing the administrator under the burden of providing plan information.

The court of appeals' expansive definition of "participant" appears to rest largely on the view that any other approach would make a person's entitlement to information about a plan "turn on the plan administrator's belief as to the merits of the claimant's request for benefits." Pet. App. A42. As a practical matter, this concern is unfounded. Administrators are aware that they are potentially subject to liability for substantial damages pursuant to Section 502(c) for failure to disclose requested information to participants. Accordingly, if an individual appears to have a colorable claim to benefits, the administrator will tend, in practice, to err on the side of inclusion in responding to a request for information. The problem with the decision

below is that it would require disclosure of information to persons without even a colorable claim to benefits.

The court of appeals candidly conceded that its expansive interpretation creates a major problem: "it is expensive and inefficient to provide people with information about benefits — and permitting them to obtain damages if information is withheld — if they are clearly not entitled to the benefits about which they are informed." Pet. App. A43. The court sought to alleviate this problem by stating that, "if the employee's claim for benefits is not colorable, and if the employer displayed no bad faith in responding to the claim — taking somewhat too long to respond to it, for instance, but not ignoring it entirely — then the district court would be well within its discretion in setting damages at $0." *Id.*

This response is wholly inadequate, however, because it addresses only the question of damages and does not address the significant costs that would be imposed upon the system if benefit plans were required to provide individualized information to everyone who requests it, including those who have long since left the covered employment and who have no right to benefits under the employer's benefit plans. The proper answer — and the one required by the plain language of the statute — is that a person who is neither eligible for benefits, nor in a position in which he may become eligible for benefits, is not a "participant," and is not entitled to rely on ERISA to obtain plan information or to sue for the failure to provide such information.

CONCLUSION

On both issues, the court of appeals' interpretation of the statute rests on its own weighing of policy choices. That function, however, is one for Congress and not for the courts. ERISA's language and history establish that the court of appeals' interpretation is contrary to the intent of Congress in enacting the statute. Accordingly, the judgment of the court of appeals should be reversed.

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Dated: June 1988

APPENDIX

THE ERISA INDUSTRY COMMITTEE MEMBERSHIP LIST
June, 1988

Aetna Life & Casualty Co.
Alexander & Alexander Services, Inc.
Allied-Signal Inc.
Aluminum Company of America
AMAX Inc.
American Express Company
American Home Products Corp.
American Telephone & Telegraph Company
Ameritech
Amoco Corporation
Apache Corporation
Ashland Oil, Inc.
Atlantic Richfield Company
Baltimore Gas and Electric Company
Bankers Trust Company
Bell Atlantic Corporation
Bell Communications Research
BellSouth Corporation
Bethlehem Steel Corporation
The Boeing Company
Bristol-Myers Company
Buck Consultants, Inc.
Caterpillar Inc.
The Chase Manhattan Bank N.A.
Chesebrough-Pond's, Inc.
Chevron Corporation
Chrysler Corporation
CIBA-GEIGY Corp.
CIGNA Corp.
Citibank, N.A.

Columbia Gas System Service Corp.
Combustion Engineering, Inc.
Coopers & Lybrand
Dana Corporation
Deere & Company
Delta Air Lines Inc.
Digital Equipment Corp.
R. R. Donnelley & Sons Company
The Dow Chemical Company
Dresser Industries Inc.
E.I. du Pont de Nemours & Company
Eastman Kodak Company
Eli Lilly and Company
Enron Corp.
Equitable Life Assurance Society of the United States
Exxon Corporation
Federated Department Stores, Inc.
FMC Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
W. R. Grace & Co.
Grumman Corporation
GTE Corporation
Gulf + Western Inc.
Frank B. Hall & Co., Inc.
John Hancock Mutual Life Ins. Co.
Hazlehurst & Associates, Inc.
Hewitt Associates
Hewlett-Packard Co.
Honeywell Inc.
ICI Americas Inc.
International Business Machines Corporation
International Paper Company
International Telephone & Telegraph Corporation

Johnson & Higgins
Johnson & Johnson
Knight-Ridder, Inc.
Kraft Inc.
Lincoln National Corporation
LTV Corp.
William M. Mercer, Incorporated
Metropolitan Life Insurance Co.
Minnesota Mining & Manufacturing Co.
Mobil Oil Corp.
MONY Financial Services
J. P. Morgan & Co. Incorporated
Motorola, Inc.
Navistar International Corporation
NYNEX Corp.
Occidental Petroleum Corporation
Olin Corporation
Pacific Gas & Electric Company
Pacific Telesis Group
J. C. Penney Co., Inc.
Pennzoil Company
Pfizer Inc.
Philip Morris, Inc.
PPG Industries, Inc.
Premark International, Inc.
Procter & Gamble Co.
The Prudential Insurance Company of America
Ralston Purina Co.
Reynolds Metals Co.
RJR Nabisco, Inc.
Rockwell International Corporation
Ryder System, Inc.
Sara Lee Corporation
Shell Oil Company
The Southland Corporation

Supermarkets General Corp.
Tenneco Inc.
Texaco Inc.
Textron Inc.
Time Incorporated
Towers Perrin Forster & Crosby
Travelers Insurance Company
TRW Inc.
Union Camp Corporation
Union Carbide Corporation
Unisys Corporation
United Technologies Corporation
USX Corp.
Westinghouse Electric Corporation
The Wyatt Company

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No. 87-1054

In the

Supreme Court of the United States

October Term, 1987

THE FIRESTONE TIRE & RUBBER CO., *et al.*,

Petitioners,

v.

RICHARD BRUCH, ALBERT SCHADE,
LEONARD A. SMOLINSKI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The American Association of Retired Persons is a not-for-profit corporation of more than twenty-nine million persons age fifty or older.[1] AARP is the largest organization of its kind in America. In representing the interests of its members, AARP seeks to promote the independence, dignity, and well-being of older Americans. Millions of AARP members, both working and retired, are covered by employee benefit plans subject to the

[1] The American Association of Retired Persons files this brief *amicus curiae* with the written consents of the parties, which have been filed with the Clerk of the Court.

Employee Retirement Income Security Act of 1974, "ERISA", 29 U.S.C. § 1001 *et seq.* Pension income provided by ERISA-covered plans plays a pivotal role in the retirement income security of Americans. The ability of AARP members and other older persons to understand the plans in which they participate and to successfully prosecute benefit claims through the judicial system may spell the difference between security and dependence, dignity and impoverishment, in their old age.[2]

The issues in the case concern (1) the standard of review applicable to a benefit denial by a plan administrator, and (2) the standing of former employees to pursue remedies when a plan administrator refuses to provide them information to which they are entitled under ERISA. AARP has a substantial interest in the resolution of these issues, each of which has direct and vital bearing on the ability of AARP members and other older Americans to have benefit disputes resolved fairly and in accordance with their written plan documents, as required by ERISA.

SUMMARY OF ARGUMENT

Both the language and the legislative history of ERISA indicate that Congress affirmatively chose to have benefit eligibility determinations reviewed *de novo* by the federal courts. The civil enforcement provisions available to plan participants provide for

[2] Employee pensions provided 16 percent of the income of individuals age 65 and over in 1986. *Aging America, Projections and Trends*, U.S. Department of Health and Human Services 61 (1988). The median income among the retired elderly receiving both social security and employer-sponsored pension benefits was approximately $14,000 in 1984, over double the median of $6,300 for those receiving only social security. See Pension Plans: Many Workers Don't Know When They Can Retire, Hearings Before the House Select Committee on Aging, H.R. Rep. No. 649, 100th Cong., 2d Sess. 24-25 (Statement of Joseph F. Delfico, General Accounting Office).

Nevertheless, an alarming number of employees simply do not understand the terms of their pension plans. The General Accounting Office has estimated that over 70 percent of the 25 million workers in pension plans were mistaken about when they would be eligible for normal retirement benefits. Pension Plans: Many Workers Don't Know When They Can Retire, General Accounting Office, 2 (August 1987). Similarly, approximately 75 percent of workers eligible for early retirement benefits either were unaware of their benefit eligibility or mistaken about their eligibility date. *Id.*

two distinct forms of relief. Equitable relief is available to plan participants under § 502(a)(3) to compel plan administrators to comply with the terms of the plan or with ERISA's fiduciary standards. 29 U.S.C. § 1132(a)(3). In contrast, § 502(a)(1)(B) authorizes the pursuit of contractual claims for legal relief "under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Contractual claims of this kind are reviewed *de novo* by the federal courts.

The presumption of *de novo* review of contractual claims for benefits is buttressed by ERISA's legislative history. The numerous versions of ERISA considered by the Senate and the House contemplated *de novo* review of claims for benefits in the forum of first resort. The only provision providing for deferential review ever considered by Congress during the ERISA legislative process had been contingent upon prior *de novo* review by an arbitrator.

The trust law principles incorporated into ERISA prohibit deference to the decision of a trustee with divided loyalties. Absent clear congressional intent to the contrary, this duty of loyalty would flatly prohibit trustees from exercising discretion in matters in which the trustee has an interest. Thus, under trust principles the decision of a conflicted employer fiduciary to deny benefits cannot be considered a discretionary act subject to deferential review.

Moreover, ERISA's exclusive purpose rule requires that plans be administered for the exclusive purpose of providing benefits to participants and their beneficiaries. The discretionary conduct of plan fiduciaries must advance these purposes. Courts should not accord deference to decisions that deny benefits to participants with no compensating benefit to the plan as a whole. Judicial review of such decisions should be *de novo*.

Finally, the remedial scheme of ERISA contains disclosure requirements designed to ensure that participants, including former employees, have access to benefit information in order to determine their rights under the law. Section 502(c) of ERISA grants standing to participants to seek statutory penalties when they have been denied such information. Nothing in ERISA suggests that the status of participants is contingent upon the plan administrator's determination of benefit eligibility.

ARGUMENT

I. A PARTICIPANT WHO HAS BEEN DENIED BENEFITS UNDER AN ERISA PLAN IS ENTITLED TO *DE NOVO* JUDICIAL REVIEW OF THE BENEFIT ELIGIBILITY DETERMINATION.

The principal issue in this case concerns the appropriate standard of judicial review under ERISA of a plan administrator's determination of benefit claims. Based on ERISA's plain language, its legislative history, and its incorporation of trust law principles, it is clear that Congress intended that such determinations be subject to a *de novo* standard of judicial review.

A. The Language Of ERISA Provides That Participants May Bring A Legal Action For Contractual Benefits Under The Terms Of The Plan Document.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). The language of ERISA demonstrates that Congress viewed benefit claims as questions of entitlement to "contractually authorized benefits," *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 147 (1985), to be reviewed *de novo* by the courts.

Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), provides that a participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan." The plan itself must be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which must "specify the basis on which payments are made...from the plan," 29 U.S.C. § 1102(b)(4). These provisions spell out a statutory scheme under which a participant's entitlement to benefits must originate from a written plan—the contract—and under which a participant may bring a civil action to compel payment of such benefits.

In contrast to the provision authorizing a participant to bring a civil action to recover benefits due under a plan, § 502(a)(3)

authorizes a participant to bring an action for "appropriate equitable relief...to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). The juxtaposition of these two enforcement provisions leads inescapably to the conclusion that Congress contemplated two distinct actions by plan participants—equitable actions to enforce ERISA's fiduciary requirements, and contractual actions to recover benefits owed under the terms of the plan.[3]

If a challenge to a benefit denial is a challenge to a discretionary act by a fiduciary, as Firestone contends, civil actions for denial of benefits would logically fall under § 502(a)(3). If this were correct, however, § 502(a)(1)(B) would be superfluous. Such an interpretation is plainly contrary to the well settled principle of statutory construction that courts should "...give effect to [the] plain language [of ERISA] unless there is good reason to believe that Congress intended to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *See also United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute.")

B. The Legislative History Of ERISA Reveals That Congress Intended *De Novo* Review Of Benefit Eligibility Determinations.

Every bill considered by the House or the Senate during the ERISA legislative process contemplated *de novo* review of benefit

[3] This dispute arises in large measure because Firestone, in drafting its termination pay plan, failed to define so basic a term as "reduction in force." Firestone's argument that courts should defer to fiduciary interpretation of plan language would encourage employers to draft similarly vague plans, thereby increasing the need for plan fiduciaries to "interpret" plan language. Such a result would be inconsistent not only with the intent of Congress to require written plans, but also with congressional intent to disclose plan information that enables employees to understand their rights and obligations under a plan. *See, e.g.*, Conference Report on H.R. 2, Pension Reform, Rep. No. 1280, 93d Cong., 2d Sess. 297, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., III Legislative History of the Employee Retirement Income Security Act of 1974, 4564 (Comm. Print) (hereafter "Legislative History") ("A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.").

determinations in the forum of first resort. Indeed, the only provision that Congress considered that provided for deferential judicial review had been contingent upon prior *de novo* review by an arbitrator. When the concept of arbitration was rejected by Congress, so too was the correlative provision for deferential review of the arbitrator's decision. In light of this legislative history, it is clear that Congress intended courts to review benefit determinations *de novo*.

The House and Senate sent two competing versions of pension reform to Conference.[4] Among the differences between the House and Senate bills were provisions for resolving benefit disputes. The House bill authorized a participant to bring a civil action "to recover benefits due him under the terms of his plan..." H.R. 2 in the House, 93d Cong., 2d Sess., § 503(e)(1)(B) (1974), *reprinted in* III Legislative History 3898, 4045.

The Senate bill was more detailed. It first included a provision requiring every plan to provide "a procedure for the fair and just review" by the administrator of "any dispute between the administrator of the plan and any participant or beneficiary...." H.R. 2 in the Senate, 93d Cong., 2d Sess., § 691(a)(1), 120 Cong. Rec. 4977 (1974), *reprinted in* III Legislative History 3599, 3813. Following internal review, a disappointed participant could (1) bring a civil action "for appropriate relief, legal or equitable," *id.*, §§ 691(b), 693, or (2) take the dispute to arbitration. *Id.*, § 691(a)(2). Even Petitioner concedes that these first stages of review were to be conducted *de novo*.[5] The Senate bill further provided that the plan would bear the costs of arbitration. *Id.*, § 691(e). The bill also provided for judicial review of an arbitrator's decision under the deferential standards of § 301 of the Labor Management Relations Act ("Taft-Hartley"). *Id.*, § 691(d). *See, e.g.*, *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R. R.*, 768 F.2d 914, 921 (7th Cir. 1985).

[4] *See* Staff of Comm. of House and Senate Conferees, Summary of Differences Between the Senate Version and House Version of H.R. 2 to Provide for Pension Reform, Part III, *reprinted in* III Legislative History 5249.

[5] Firestone noted that the Senate version of ERISA would have taken "claims authority away from fiduciaries." Brief of Petitioner at 16.

The House conferees opposed the arbitration requirement "on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes." 120 Cong. Rec. 29,941 (1974), *reprinted in* III Legislative History 4769 (comments of Senator Jacob Javits).[6] The Senate conferees yielded to this concern, agreeing to delete the arbitration provisions. The remaining structure of the Senate bill for benefit disputes—an internal review of a benefit denial followed by a civil action to recover benefits[7]—was retained. Not a word in the legislative history mentions or gives any reason to infer deferential review in such civil actions.

Firestone nevertheless argues that Congress intended deferential review because § 402(a)(2) of ERISA, 29 U.S.C. § 1102(a)(2), incorporates language from the House bill that requires every plan to "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." Brief of Petitioner at 16. Firestone's argument in a nutshell is that Congress rejected ar-

[6] Firestone misinterprets the legislative history when it says that the House was concerned about the cost of deferential review rather than the costs of arbitration. Brief of Petitioner at 16. Firestone implies that a *de novo* standard of review would encourage frivolous lawsuits. This is incorrect. A former employee suing for benefits must hire an attorney to file a lawsuit. While ERISA has a provision for attorneys' fees, the plaintiff will have to bear the expense of the case if the suit is unsuccessful. Moreover, courts have discretion to deny attorneys' fees even to a prevailing plaintiff, *see Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980), and may even assess attorneys' fees against a plaintiff who brings a frivolous lawsuit. 29 U.S.C. § 1132(g)(1). These facts make it unlikely that frivolous cases will be filed, regardless of the standard by which the plan's decisions are to be judged.

[7] The Senate bill included a single section authorizing participants to bring civil actions, "both equitable and legal." H.R. 2 in the Senate, 93d Cong., 2d Sess. § 693, *reprinted in* III Legislative History 3599, 3816. The Conference substitute separated the Senate's single provision into two separate sections, one authorizing equitable actions to redress fiduciary misconduct, and one authorizing legal actions to recover benefits under the plan, as the House had provided.

bitration and *de novo* judicial review in favor of a grant of discretionary authority to the named fiduciary: "Congress made an explicit decision to give fiduciaries the discretion to decide benefits claims and rejected attempts to take claims authority away from fiduciaries." Brief of Petitioner at 16.

There is absolutely nothing in the legislative history, however, that ties the standard of review to the requirement that a plan have a named fiduciary.[8] ERISA's legislative history states that the named fiduciary "is required so the employees may know who is responsible for operating the plan."[9] Thus, contrary to Firestone's assertion, § 402(a)(1) was not a grant of authority to named fiduciaries but a *disclosure* requirement.

If Congress had intended to provide for deferential judicial review of benefit denials, it would have said so. The Senate, in its proposed version of ERISA, had no difficulty in providing for deferential review of an arbitrator's decision. In other contexts, Congress has demonstrated its capability of formulating language to provide for deferential review. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(a). Congress simply did not provide for deferential review of benefit denials under ERISA and such review cannot fairly be implied. Accordingly, ERISA should be read in accordance with its plain meaning, that participants' contractual claims to recover benefits due them under the written plan should be reviewed *de novo* by the courts.[10]

[8] A detailed "comparative analysis of the Senate-passed and House-passed versions of" ERISA prepared by the Congressional Research Service failed to even mention the language that became § 402 of ERISA. *See* 120 Cong. Rec. 4251 (1974), *reprinted in* III Legislative History 4252.

[9] H. Conf. Rep. 1280, 93d Cong., 2d Sess. 297, *reprinted in* III Legislative History 4564.

[10] The notion of employee plans as establishing contractual entitlement is not novel to ERISA. Prior to ERISA, the modern judicial trend had been to regard an employee's rights under an employee benefit plan "as a conditional contract right," *Gitelson v. Du Pont*, 17 N.Y.2d 46, 268 N.Y.S.2d 11, 215 N.E.2d 336, 338 (1966), rather than "a mere gratuity, to be bestowed upon such objects of the donor's bounty." *Russell v. Princeton Laboratories, Inc.*, 50 N.J. 30, 231 A.2d 800 (1967). *See generally*, Note, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. Chi. L. Rev. 96 (1955).

C. Trust Law Calls For *De Novo* Review Of Benefit Decisions By Plan Administrators Who Have Interests In Conflict With Those Of The Plan's Participants.

Two competing versions of ERISA's standard of judicial review are urged upon this Court, an arbitrary and capricious standard and a standard of *de novo* review. In cases where a plan administrator's interest conflicts with those of plan participants, only the latter standard is consistent with the trust duty of loyalty which Congress made the foundation of ERISA's fiduciary provisions.

The duty of loyalty is "the most fundamental duty owed by the trustee to the beneficiaries of a trust." III Fratcher, Scott on Trusts § 170 (4th ed. 1988). Ordinarily the duty of loyalty does not permit fiduciaries to exercise discretion in a matter in which the fiduciary has an interest.[11] *See generally Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 269 (1941); *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). Yet Firestone argues that ERISA should be interpreted in a manner that permits a fiduciary to exercise discretion in a decision that pits the fiduciary's interests in avoiding benefit payments against the participants' interest in receiving them.

Firestone's argument, taken to its logical conclusion, is that Congress intended to undermine the duty of loyalty as applied to employer fiduciaries making benefit decisions.[12] The only

[11] Courts have held that trustees with an interest in conflict with trust beneficiaries must either resign their position, *e.g.*, *Fidelity Union Trust Co. v. Johnson*, 140 N.J. Eq. 548, 55 A.2d 813 (1947), or petition the court to make decisions on matters in which the trustees have conflicting interests. *See, e.g.*, *Rogers v. Rogers*, 111 N.Y. 228, 18 N.E. 636 (1988); *Armington v. Meyer*, 103 R.I. 211, 236 A.2d 450 (1967).

[12] Brief of Petitioner at 29. Firestone contends that trust law principles require courts to defer to a fiduciary's decisions "even when the fiduciary has a conflict." Brief of Petitioner at 28. In Firestone's view, the conflict is only one of many factors to be considered by a court. *Id.* In fact, courts will not permit a trustee with a conflict of interest to take discretionary action unless it is clear that the settlor *intended* the trustee to act despite the conflict. *See* III Fratcher, Scott on Trusts, 187.5 n.5 (cases cited hold that trustee may act despite conflict of interest only if settlor authorized the trustee to act despite the conflict).

evidence that Firestone points to in support of this novel assertion is that ERISA permits employees of the employer to serve as plan fiduciaries without causing a *per se* violation of ERISA's prohibited transaction rules. *See* 29 U.S.C. § 1108(c)(3). That section alone is hardly sufficient evidence of congressional intent to waive the duty of loyalty, for in such situations, courts:

> adhere to the rule of strict construction in favor of the trust...The presumption of the law is against [power to act despite a conflict of interest] and, in the absence of clear provision to the contrary, all doubts regarding the scope of the language upon which the claim for such a power is made must be resolved against the party making the claim.

City Bank Farmers Trust Co. v. Taylor, 76 R.I. 129, 69 A.2d 234 (1949); *see also* Retirement Income Security Act of 1973, S. Rep. No. 127, 93d Cong., 1st Sess. 29, *reprinted in* I Legislative History 587, 615 (indicating that Congress codified certain trust principles because, *inter alia*, it wished to prevent settlors from exempting fiduciaries from common law trust duties as they had been permitted to do under state law).

Given the lack of clear congressional intent to override the strictures of the duty of loyalty, ERISA should be interpreted in a manner that precludes fiduciaries from exercising discretion on matters affecting their own interests. Accordingly, when plan fiduciaries make decisions affecting their interests, courts must apply a *de novo* standard of review. Any other interpretation of ERISA threatens participant security in the benefits ERISA was enacted to preserve and protect.

D. The Taft-Hartley Standard Of Review Is Inapplicable To ERISA Benefit Plans.

Several courts of appeals have concluded that the arbitrary and capricious standard developed under Taft-Hartley is applicable to ERISA. *See, e.g., Palino v. Casey*, 664 F.2d 854, 858 (1st Cir. 1981); *Bayles v. Central States, Southeast and Southwest Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979). These courts,

however, have reached their conclusion "without any discussion of the differences between LMRA and ERISA." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 143 (3d Cir. 1987).

There are four significant differences between Taft-Hartley and ERISA that make the Taft-Hartley standard of review inappropriate under ERISA.

First, Taft-Hartley did not include, as ERISA does, any provision authorizing participant suits for benefits. In contrast, ERISA specifically provides jurisdiction authorizing participants to bring civil actions to recover benefits under the terms of the plan (and not only to remedy a breach of the exclusive purpose rule, 29 U.S.C. § 1104(a)(1)(A)). This very different statutory structure alone indicates that Congress was not simply extending judicially developed Taft-Hartley benefit dispute principles to other types of employee benefit plans covered by ERISA.

Second, Taft-Hartley is administered jointly by representatives of employees and employers. 29 U.S.C. § 186(c)(5)(B). In the view of the Seventh Circuit[13] and the Third Circuit, this structural requirement "assured that the plan administrator will be neutral," and thus "it is easy to understand why the courts adopted this rule for judicial review of decisions made in the administration of an LMRA plan." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d at 144.

In many ERISA plans, however, the employer has "the whip hand," *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1988), and there can be "no assurance of the trustee's impartiality [since] every dollar provided in benefits is a dollar spent by...the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in [the employer's] pocket." *Bruch*, 828 F.2d at 144.

Third, Taft-Hartley benefit determinations often allocated scarce resources among competing potential beneficiaries, which is necessarily a fiduciary function. Courts have observed of Taft-Hartley that "we review for arbitrariness in the light of the trustees'

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[13] *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1988).

responsibility to all potential beneficiaries," *Rueda v. Seafarers International Union of North America*, 576 F.2d 939, 942 (1st Cir. 1978), and that the function of Taft-Hartley trustees "is to preserve the vitality of the fund and to effectively apply its worth to the benefit of as many intended employees as is economically possible." *Gaydosh v. Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969).

In contrast to Taft-Hartley trustees, fiduciaries under ERISA are sometimes called upon to determine whether the employer should have to apply corporate resources to pay benefits to employees. This was the situation confronting the Firestone administrator of the unfunded termination pay plan here in issue. Under these circumstances, the plan fiduciary is not exercising his discretion on how best to preserve the vitality of the fund and to effectively apply its worth to the benefit of as many intended employees as is economically possible.

Fourth, Taft-Hartley trustees were often given discretionary authority not only to apply rules made by the settlor but to make rules.[14] In effect, Taft-Hartley trustees often were called upon to perform "settlor" functions. The promulgation of coverage and eligibility rules is a discretionary act to which courts must necessarily accord deference. The function of ERISA fiduciaries, however, is to apply rules already adopted and communicated to the employees. There is no reason to limit judicial review of the application of such rules.

E. The Exclusive Purpose Rule Requires *De Novo* Review Of Benefit Denials.

ERISA's exclusive purpose rule requires fiduciaries to administer ERISA plans for the exclusive purpose of providing

[14] *See, e.g., Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969) (rule adopted by trustees of UMWA Welfare and Retirement Funds denying benefit credit for periods in which miners were connected with the ownership of a mine); *Roark v. Boyle*, 439 F.2d 497 (D.C. Cir. 1970) (rule denying pensions to miners unless their last year of employment before retirement was served with a union employer); *Toensing v. Brown*, 374 F. Supp. 191 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1985) (rule increasing pensions to carpenters who retired after June 30, 1971 more than pensions to carpenters who retired on or before that date).

benefits to participants and their beneficiaries. 29 U.S.C. § 1104(a)(1)(A)(i). A fiduciary's discretionary act must promote this purpose and no other. A decision to deny benefits to participants does not advance the purpose of providing benefits to participants unless there is a compensating advantage to the plan.[15] A decision to deny benefits in an unfunded plan provides no such compensating advantage and therefore falls outside the range of permissible discretionary acts under the exclusive purpose rule. Thus, courts should the benefit dispute as a contractual question subject to *de novo* review.

The facts in this case illustrate the need for *de novo* review. The two affidavits of Thomas E. Robinson, Director of Compensation and Management Development for Firestone, indicate that the only guideposts he used in interpreting the plan were Firestone's goals, intentions, and purposes.[16] Conspicuously absent from the factors considered by Mr. Robinson were the expectations and understandings of Firestone's former employees about the plan, the likelihood that the former employees would lose their jobs after the sale of the division, the existence or nonexistence of a comparable termination pay plan by the purchaser

[15] Pre-ERISA cases often held that pension plans should be construed in favor of the employees. *See, e.g., Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1354 (8th Cir. 1980); *Thornberry v. MGS Co.*, 46 Wis.2d 592, 176 N.W.2d 355, 360 (1970).

[16] The affidavits indicate that Mr. Robinson interpreted the plan to conform to Firestone's "basic termination pay policies and its RIF pay policies" (JA 119), which, to the limited extent they were expressed in writing, appeared only in a manual that "has always been deemed confidential." (JA 121) These goals apparently included avoiding "unfairness" to the employees, (JA 124) and they sometimes resulted in paying benefits when Firestone sold a division as an ongoing business but other times did not. (JA 121-22) Although nowhere articulated in the personnel manual, Firestone claims that an important consideration in deciding when employees of such divisions are entitled to termination pay is Firestone's subjective assessment of the comparability of benefits offered by Firestone and those offered by the new owner of the division. (JA 121-22) Mr. Robinson, the Firestone employee responsible for interpreting the termination pay plan, did not, however, actually compare benefits, but relied upon discussions with people he believed to be "knowledgeable" about benefit levels at Firestone and Occidental, the new owner. (JA 125)

of the division, and the fact that important aspects of the termination plan had never been committed to writing and in any event never communicated to the employees. In short, Mr. Robinson interpreted the plan for the exclusive purpose of conforming the plan to Firestone's often unstated policies, rather than for the exclusive purpose of providing benefits for the supposed beneficiaries of the plan. As a result, Mr. Robinson appropriated for Firestone's sole benefit this unfunded plan's sole asset—Firestone's promise to provide termination pay, a promise that Firestone's employees had earned with their labor no less than if the plan had been funded. Firestone's former employees are entitled to have the meaning of that promise determined *de novo*.

II. THE COURT OF APPEALS CORRECTLY RULED THAT FORMER EMPLOYEES HAVE STANDING TO SEEK RELIEF UNDER ERISA SECTION 502(c).

The court of appeals held that former employees have standing to pursue claims under § 502(c) when they are denied information about their plan and benefits.[17] The plain language of the statutory definition of participant supports the Third Circuit's holding.

ERISA defines participant to include "any...former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). In determining whether former employees are participants, the issue is the meaning that should be given to the phrase "may become eligible." The court of appeals held that the phrase refers to an "employee or former employee who claims to be a participant or beneficiary." *Bruch*, 828 F.2d at 153. Two other courts of appeals have suggested that the term refers to former employees with colorable claims for benefits. *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 303 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *Saladino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

[17] Section 104(b)(4) of ERISA provides that participants and beneficiaries of any ERISA plan have a right to request documents concerning their plan. Section 105 of ERISA provides that participants and beneficiaries of an ERISA pension plan may request a statement describing the benefits they have earned to date. 29 U.S.C. § 1025. Under § 502(c), a plan administrator who fails to supply requested documents or a requested benefit statement is subject to a maximum $100 per day penalty, subject to the discretion of the federal district court. 29 U.S.C. § 1132(c).

Firestone rejects both of these approaches and contends instead that the phrase "may become eligible" refers not to the possibility that a claimant may prevail in his suit for benefits, but rather to an employee's or former employee's "ability to fulfill the plan's eligibility criteria at some time in the future" as determined by the plan administrator.[18] Brief of Petitioner at 35.

Denying participant status to former employees who claim to be participants is entirely incompatible with certain ERISA provisions that refer to "participants." As the Third Circuit recognized, such a restrictive definition of participant would mean that former employees would be unable to bring civil actions under

[18] Although the Fifth Circuit Court of Appeals appeared to have adopted this approach in *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980), a subsequent Fifth Circuit case, *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), recognizes that courts should not foreclose former employees' rights to information. In *Paris*, former employees requested documents under § 104(b)(4) of ERISA. The administrator failed to provide the documents and the employees sued for damages under § 502(c). The Fifth Circuit observed:

> The short answer may be that since the plaintiffs were not participants they were not entitled to any information. However, at the time of this request their status was far from clear, and we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement. The decision to grant relief under 29 U.S.C. § 1132(c) is committed to the discretion of the trial judge. We take his disposition of this case as a decision not to grant relief. The plaintiffs have not attempted to demonstrate that they were prejudiced by the alleged failure to respond, and we cannot say that the district court abused its discretion.

Paris, 637 F.2d at 362. In light of *Paris*, the Fifth Circuit's position appears to be that former employees have standing under § 502(c) for damages unless, as in *Nugent*, the employee admits that she has no present colorable claim to benefits.

of the division, and the fact that important aspects of the termination plan had never been committed to writing and in any event never communicated to the employees. In short, Mr. Robinson interpreted the plan for the exclusive purpose of conforming the plan to Firestone's often unstated policies, rather than for the exclusive purpose of providing benefits for the supposed beneficiaries of the plan. As a result, Mr. Robinson appropriated for Firestone's sole benefit this unfunded plan's sole asset—Firestone's promise to provide termination pay, a promise that Firestone's employees had earned with their labor no less than if the plan had been funded. Firestone's former employees are entitled to have the meaning of that promise determined *de novo*.

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Paris, 637 F.2d at 362. In light of *Paris*, the Fifth Circuit's position appears to be that former employees have standing under § 502(c) for damages unless, as in *Nugent*, the employee admits that she has no present colorable claim to benefits.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), which authorizes actions by "participants and beneficiaries."[19] *Bruch*, 828 F.2d at 152.

An even more telling example is Section 503 of ERISA, 29 U.S.C. § 1133, which provides that:

> every employee benefit plan shall—(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant and (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review of the decision denying the claim.

If Firestone's interpretation of the term "participant" applied to Section 503, it would yield the paradoxical result that the only individuals who are entitled to receive detailed written notices of benefit denials are those whose benefits are granted; and the only individuals who are entitled to a full and fair review of a claims denial are those whose claims were not denied. For purposes of Section 503 of ERISA, the term participant includes former employees who claim entitlement to benefits, the definition adopted by the Third Circuit.

The legislative history also supports a definition of participant that enhances the ability of individuals to obtain information about their benefits. One reason Congress mandated disclosure was so "that individual participants and beneficiaries will be armed with enough information to enforce their own rights." S. Rep. 127, 93d Cong., 1st Sess. 27, *reprinted in* I Legislative History 587,

[19] Firestone argues that an individual lacks standing *ab initio* to bring an action to recover benefits if the court ultimately determines he is not eligible for benefits. Brief of Petitioner at 43. This interpretation improperly lumps together the determination of standing and a determination of the merits. The inquiries of standing and entitlement to benefits must be separate, since standing does not depend on the merits of the case. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975).

613. The Third Circuit correctly observed that this "function can be performed only if all people with potential rights can obtain information." *Bruch*, 828 F.2d at 153.

Moreover, the burden on plans to supply information to former employees who request it is quite small. First, the plan incurs no cost to identify participants, since they have identified themselves. Second, "[t]he administrator may make a reasonable charge to cover the cost of furnishing such complete copies" of documents to participants. 29 U.S.C. § 1024(b)(4). Third, as Firestone concedes, employers as a general matter do comply with requests for information "because of the constraints of ERISA and also because it makes good sense from an employee relations standpoint to do so." Brief of Petitioner at 41. Finally, there is simply no reason to believe that legions of former employees with no rights to benefits will suddenly descend upon plan administrators with unreasonable requests for documents and benefit statements.

Firestone nonetheless argues that the definition of "participant" set forth by the Third Circuit will subject plans to administrative nightmare and such great expense that "amounts available to actual beneficiaries of the plan" will have to be reduced. Brief of Petitioner at 41. Firestone is apparently referring not only to ERISA rules requiring plans to respond to participant requests for either documents or benefit statements, but to the ERISA disclosure provisions requiring a plan to provide certain documents to all participants and beneficiaries on the plan's own initiative. *See* Brief of Petitioner at 41.

Firestone's fears are unwarranted. The definition of the term "participant" can take account of Firestone's concerns by focusing on who has the burden of initiating action under each ERISA section in which the term appears. In sections that place the burden of initiating action on the participant, the former employee makes the determination of whether he might become entitled to benefits. Thus, in this case, the former Firestone employees who sought information made the determination that they might become eligible for benefits and were thus participants for purposes of § 502(c). In sections that place the burden of initiating action on the plan (for example, § 104(b)(3) of ERISA, which

requires the plan administrator annually to provide plan participants with certain schedules and reports, 29 U.S.C. § 1004(b)(3)), the plan administrator makes the determination of who might become eligible for benefits and is thus a participant. This approach avoids the concerns of Firestone and amici curiae concerning administrative burdens on the plan and at the same time permits effectuation of congressional intent to permit former employees to obtain plan information to assist them in determining whether to pursue a claim for benefits.[20]

[20] A similar approach may in fact be mandated by § 101(a) of ERISA, 29 U.S.C. § 1001(a). This section provides that the disclosures required by §§ 102(a)(1), 104(b)(3), 105(a) and (c), must be made to "participants covered under the plan and to each beneficiary who is receiving benefits under the plan." This suggests that there is another class of participants (not covered under the plan) and beneficiaries (not receiving benefits under the plan) who are entitled to information under other ERISA disclosure provisions, *i.e.*, §§ 104(b)(2) and 104(b)(4). This construction of the statute differs from the textual argument with respect to the availability of benefit statements to former employees who are not covered by the plan. As a practical matter, however, such former employees can obtain a near equivalent to such benefit statements by filing a claim for benefits under § 503 of ERISA, 29 U.S.C. § 1133, which requires the plan to provide the former employees with a statement explaining the reason for the plan's denial of benefits.

CONCLUSION

For the foregoing reasons, the Court should hold that participants are entitled to *de novo* review of benefit determinations under ERISA. The Court should further hold that a former employee is a participant under ERISA for purposes of requesting information regarding the plan and benefit eligibility.

Dated: August 15, 1988

Respectfully submitted,

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(13)

No. 87-1054

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Pension Rights Center submits this brief as *amicus curiae* in support of the Respondents, Richard Bruch et al. Written consent to file this brief has been obtained from the parties and their letters have been filed with the Clerk of the Court pursuant to Rule 36 of the Rules of the Court.

The Pension Rights Center is a nonprofit, public interest organization established in 1976 to protect and promote the pension rights of workers, retirees and their families. The Center is the only organization in the country committed to full-time representation of the interests of pension plan participants and beneficiaries.

The Pension Rights Center provides information and assistance to thousands of pension plan participants and beneficiaries each year. The Center's ability to help individuals to recover pensions they have been denied under the terms of their plans and to receive documents enabling them to establish their entitlement to benefits will be directly affected by the resolution of the issues presented by this case.

SUMMARY OF ARGUMENT

(1) Congress did not intend for the arbitrary and capricious standard of review to be applied where, as in this case, participants are seeking to recover benefits due them under the terms of a plan. That standard of review is generally applicable only to claims brought against plan fiduciaries alleging that the fiduciaries have breached the duty of loyalty owed to participants under Section 404(a)(1) of ERISA (29 U.S.C. § 1104(a)(1)). The distinction between these actions for breach of fiduciary obligation, brought under ERISA Section 502(a)(2), and contractual actions brought under Section 502(a)(1)(B) (29 U.S.C. § 1132(a)(1)(B)) was recognized by this Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985).

Before ERISA, courts typically treated suits against single-employer plans to recover benefits due under the terms of those plans as contractual actions reviewable *de novo*. The legislative history of ERISA makes plain that Congress did not intend to reject this long-standing approach but merely to change the terms of employee benefit plan contracts to correspond to the reasonable expectations of workers.

None of the cases arising under the Labor-Management Relations Act of 1947 (29 U.S.C. § 141) relied on by Petitioners were contractual actions to recover benefits due under plan terms. Rather, all involved claims

that plan trustees had abused discretion expressly conferred by a trust document by adopting plan rules that were not for the exclusive benefit of participants.

Also, contrary to Petitioners' contentions, the ERISA Conference Committee did not grant new discretion to plan administrators to make benefit claims decisions. Neither in the Conference Committee nor any other time did Congress consider proposals that would have required courts to defer to benefit claims decisions made by plan administrators.

Under an arbitrary and capricious standard of judicial review, participants have the burden of proving that a benefit denial constitutes an abuse of discretion by a plan administrator. This is an unrealistic and unduly heavy burden to place on participants seeking to enforce the terms of their plans. Continued application of the arbitrary and capricious standard to actions arising under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), would frustrate ERISA's "overwhelming purpose of protecting the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984).

(2) Congress intended that ERISA Sections 104(b)(4) and 502(c) (19 U.S.C. §§ 1024(b)(4), 1132(c)), requiring disclosure of plan information on request, apply to all former employees who claim eligibility for benefits. It is inconsistent with ERISA's overall purpose of protecting the interests of all participants and beneficiaries to leave to the plan administrator the determination of who is entitled to request information. Participants should not be required to satisfy special conditions in order to obtain information. Allowing participants easy access to information about their benefits will help ensure that participants and beneficiaries will collect the benefits to which they are entitled.

ARGUMENT

I. THE STANDARD OF REVIEW GOVERNING SUITS AGAINST PLAN ADMINISTRATORS FOR BREACH OF FIDUCIARY DUTY IS INAPPLICABLE TO SUITS AGAINST PLANS TO RECOVER CONTRACTUALLY AUTHORIZED BENEFITS.

Petitioners, Firestone et al., contend that since ERISA "grants fiduciaries the discretion to make benefits decisions," judicial review of the Firestone fiduciaries' decision to deny Respondents' claim for termination pay benefits is limited to determining whether the fiduciaries have abused their discretion. Petitioners Brief at 5. Petitioners rely on Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), and Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. Section 186(c)(5) which, they assert, "contain fiduciary responsibility provisions relevant to the standard of review question." Petitioners' Brief at 2.

Petitioners' contentions would be relevant to the issues presented in this case if Respondents had initiated this action against the Firestone plan fiduciaries under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). Such an action would have sought to hold the fiduciaries personally liable under ERISA Section 409 for violation of the duty of loyalty imposed on them by Section 404(a)(1), and judicial review of the fiduciaries' actions would be limited by the trust-based arbitrary and capricious standard.[1]

[1] Section 502(a)(2) provides that a participant may bring an action "for appropriate relief under Section 409." Section 409 states that a fiduciary "who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." Section 404(a)(1) provides in relevant part that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits" and defraying reasonable administrative expenses.

The Respondents, however, initiated this action under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B),

> *to recover employee benefits due them under the terms of* . . . the Firestone Tire & Rubber Company Basic Termination Pay Plan and/or Reduction-in-Force Termination Pay Plan . . . *to enforce their rights under the terms of these Plans and to clarify their rights to future benefits under the terms of these Plans.* (emphasis added) Second Amended Complaint JA 93[2]

As this Court recognized in *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), a Section 502(a)(1)(B) action seeking to recover "contractually authorized benefits" is very different from a Section 502(a)(2) action for "breach of fiduciary obligations".[3]

[2] Section 502(a)(1)(B) provides that a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

[3] In *Massachusetts Mutual Life Ins. Co.* v. *Russell*, a beneficiary had initiated a breach of fiduciary duty action under Section 502(a)(2) against Massachusetts Mutual Life for its failure to process the beneficiary's claim for benefits in good faith and in a fair and diligent manner. The Court noted that no Section 502(a)(1)(B) action had been asserted because the beneficiary "has been paid all benefits to which she is *contractually entitled*." (emphasis added) *Id.* at 136.

Justice Brennan, in his concurring opinion, discussed ERISA's "repeatedly emphasized purpose to protect *contractually defined benefits*." (emphasis added). *Id.* at 148 and noted that the ERISA Conference Report emphasized that under Section 502, participants and beneficiaries were entitled not only to recover benefits due under the plan but also to obtain other "relief from breach of fiduciary duty." "(beneficiaries entitled to receive benefits 'as well as to obtain redress of fiduciary obligations')" *Id.* at 153 n.9, citing H.R. Conf. Rep. No. 93-1280 at 326-327 and 120 Cong. Rec. 29933 (remarks of Sen. Williams).

In a Section 502(a)(2) action the claim is ordinarily that fiduciaries have breached the duty of loyalty owed to participants by acting in the administrators' own interests or those of a third person, or that they have acted in bad faith or abused specific discretionary authority expressly conferred on the fiduciaries by the plan document. In a Section 502(a)(2) action "liability . . . is against the fiduciary personally, not the plan," *Id.* at 138, and the recovery "inures to the benefit of the plan as a whole." *Id.* at 140.

In contrast, under Section 502(a)(1)(B) participants usually allege, as they did here, that the plan has wrongly interpreted the "plan contract". They may also claim that the plan has incorrectly calculated a benefit or failed to credit service required by the terms of the plan. Under Section 502(a)(1)(B) liability is against the *plan* and the remedy flows to the *participant*.[4]

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[4] Other differences between Section 502(a)(2) actions and Section 502(a)(1)(B) actions are that 502(a)(2) actions can only be brought in federal courts, whereas 502(a)(1)(B) actions can be brought in both state and federal courts. Also, complaints in 502(a)(2) actions must be served upon the Secretary of Labor and the Secretary of the Treasury. There is no such requirement for 502(a)(1)(B) actions. 29 U.S.C. §§ 1132(e)(1) and (h).

ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), provides a "hybrid" equitable cause of action that allows participants to institute actions either "to enjoin any act or practice which violates any provision of this title" or to enjoin any act or practice which violates "the terms of the plan". To the extent that Respondents are seeking injunctive relief in this case, they are asking the court to find that Respondents' construction of the plan was unreasonable and to compel the plan to make payment under the terms of the plan. JA103, 107

II. CONGRESS INTENDED *DE NOVO* REVIEW OF PLAN ADMINISTRATORS' DECISIONS DENYING BENEFITS WHERE PARTICIPANTS ARE SEEKING TO RECOVER CONTRACTUALLY AUTHORIZED BENEFITS.

For purposes of this case, the most significant difference between fiduciary and contract actions is that Congress intended that courts would review Section 502(a)(2) actions under a traditional trust law deferral standard, while applying a *de novo* standard of review to contractual actions brought under Section 502(a)(1)(B).

A. The Legislative History of ERISA Makes Plain That Congress Did Not Intend Courts to Abandon Their Long-Standing Practice of *De Novo* Review Where Participants Are Seeking to Recover Benefits Due Under the Terms of Their Plans.

Before ERISA, courts typically used a contractual approach to cases brought by participants who were seeking to recover benefits under plans set up and administered by a single employer. The courts uniformly reviewed plan administrators' decisions *de novo* and the cases were most commonly decided on unilateral or, in the case of union-negotiated plans, bilateral contract theories. B. Aaron, *Legal Status of Employee Benefit Rights Under Private Pension Plans*, 4-20 (1961).[5] In commenting on the reluctance of the courts to adopt more liberal noncontractual approaches to these cases, Professor Aaron noted, "Indeed it is no exaggeration to say that the one legal principle upon which employees may reasonably rely for protection of their pension bene-

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[5] See also D. McGill, *Fulfilling Pension Expectations*, 161-167 (1962). Although there were efforts to apply common law trust principles to suits to recover benefits under the terms of employee benefit plans, they were much less common and generally unsuccessful; P. Harbrecht, *Pension Funds and Economic Power* 170-184 (1960).

fits is that *the typical modern pension plan is an enforceable contract.*" *Id.* at 13.

Before ERISA, most participants were unable to secure benefits because the terms of their employee benefit plan contracts provided them no protection. Either they could not satisfy the unrealistic requirements of the terms of their plans, or there were disclaimers of responsibility, for example, where an individual clearly qualified for benefits, but the plan was inadequately funded.

For this reason Congress' principal objective in enacting ERISA was to *change the terms of the contract.* The law required that all pension plans adopt participation, vesting, benefit accrual and survivors benefit provisions in order to assure that the reasonable expectations of plan participants would be met.[6] As Congressman John H. Dent, Chairman of the General Subcommittee on Labor and one of the four principal authors of ERISA, stated in connection with the submission of the ERISA Conference Report to the House of Representatives "we started out with only one aim in view and that was to give a pension participant his entitlements under the *contract* of the pension plan he belonged to. (emphasis added) (August 20, 1974) 3 *Legislative History of the Employee Retirement Income Security Act of 1974* 4665.

Nowhere in the legislative history of ERISA is there any suggestion that courts should abandon the practice of *de novo* review of contractual actions in favor of a trust law deferral standard.[7] Instead, a consistent theme

[6] "Congress sought to remedy the predicament of thousands of employees whose expectations of adequate retirement income were destroyed by stingy pension plan provisions, bad management or inadequate funding." *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 136 n.2 (D.C. Cir. 1984).

[7] "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, inter-

throughout the development of the law was that Congress was committed to providing participants with "ready access to the Federal courts" (ERISA Section 2(c), 29 U.S.C. § 1001(c)) both to recover benefits under the terms of their plans and, separately, to sue for breaches of fiduciary duty. Based on pre-ERISA precedent and practice, Congress anticipated that courts would continue to provide participants *de novo* review if the denial of their benefits turned on the construction of plan language, and review under a trust law deferential standard if they were claiming that the denial resulted from improper exercise of discretion.

B. The Pre-ERISA LMRA Cases Cited By Petitioners Do Not Apply to Contractual Actions Seeking to Recover Benefits Due Under Plan Terms.

Petitioners are correct in noting that Congress was familiar with the cases decided under Section 302(c)(5) of the Labor-Management Relations Act of 1947. Petitioners' Brief at 13-14. However, they fail to point out that these cases were not suits to recover benefits due under the terms of a plan. Rather, they were challenges to the trustees' exercise of broad discretionary authority expressly conferred by trust documents.

Unlike single-employer plans, many jointly-trusteed trusts conferred discretion on the trustees to set the plans' benefit eligibility rules.[8] Participants in these plans were, in some instances, able to successfully challenge rules adopted by their trustees by contending that these rules violated the requirement of LMRA Section 302(c)(5) that the trust fund be for the "sole and exclusive benefit of the employees . . ." The courts in these cases found that the rules had no rational basis, had

related, and interdependent remedial scheme." *Massachusetts Mutual Life Ins. Co.* v. *Russell, supra* 473 U.S. at 133.

[8] N. A. Levin, *Labor-Management Benefit Funds* at 131 (1971).

been adopted without satisfying minimal requirements of due process, or were designed to further the trustees' own personal or institutional interests.[9]

Congress retained participants' rights to challenge trustees' breaches of the duty of loyalty under the LMRA, and incorporated that right into Section 502(a)(2) of ERISA. However, only those participants in jointly-trusteed plans that gave trustees a broad rule-setting mandate were protected by these provisions.

C. ERISA Did Not Grant Fiduciaries New Discretionary Authority to Decide Benefit Claims.

Petitioners contend that in reconciling differences between the Senate and House-passed versions of ERISA, the Conference Committee granted fiduciaries new discretionary authority "to make benefit decisions" and that Congress intended that courts should defer to the exercise of this new discretion under traditional trust law principles of deferral. Petitioners find this grant of authority in the requirement in Section 402(a)(1) that the instrument establishing a plan

> shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a)(1)

They argue that Section 402(a)(1) reflects "an explicit decision" by the ERISA Conference Committee "to give fiduciaries the discretion to decide benefit claims and [to reject] attempts to take claims authority away from fiduciaries." Petitioners' Brief at 15-16.

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[9] The leading cases were brought by participants in the United Mine Workers of America pension fund. Until 1974 the trustees in that fund had "full authority with respect to questions of coverage and eligibility" since all plan rules were set by trustee resolutions. *See UMW Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982).

In support of their interpretation, Petitioners argue that the Conference Committee traded off Section 691(a) of the Senate bill, giving participants the right to arbitrate benefits disputes, in exchange for language adapted from Section 111(a)(1) of the House bill providing that plan administrators were to have "full authority and responsibility for the operation of "employee benefit plans" H.R. 2 passed by the Senate, 3 *Leg. Hist.* 3813-3814; H.R. 2 passed by the House, 3 *Leg. Hist.* 3898.

The reality is that the Conferees granted no new discretion to administrators. Administrators had always had full authority and responsibility for the operation of plans, including the responsibility for deciding benefit claims. Professor Dan McGill, describing a plan administrator's responsibilities in 1962, wrote that the plan administrator "interprets the provisions of plan relating to benefit eligibility and amounts and adjudicates all claims for benefits, whether routine or controversial." *supra* at 22. *See also* J. McNulty, Jr., *Decision and Influence Processes in Private Pension Plans* (1961) at 29.

Petitioners nevertheless seek to convey the impression that the fiduciary provisions adopted by the Conferees were intended to be a substitute for impartial arbitration, and accordingly that a standard of review akin to that for arbitrators' decisions is now appropriate for reviewing plan administrators' benefit claims decisions. The Conferees' decision to drop the Senate arbitration provision, however, in no way signalled an intent to have courts adopt a more deferential standard of review than before in suits to recover contractually authorized benefits.

As a starting point, the benefit claims decision-making functions of plan administrators were the same under both the Senate bill and ERISA. Section 691(a)(1) of

the Senate bill provided that participants whose claims were denied by the plan be given a "full and just review" by the plan administrator. ERISA Section 503(2) calls for a "full and fair review". 29 U.S.C. § 1333(b).

Further, although Sections 691(a)(2), (c) and 694 of the Senate bill gave participants the option of seeking arbitration or going to court (to "recover benefits due") after the administrators had denied their appeals, there was no provision for the arbitrators (or the courts) to defer to the administrators' decisions. The only deference proposed was that courts reviewing arbitrators' decisions should defer to the arbitrators. Thus the elimination of the Senate bill's arbitration provision has no bearing on the issue before the Court, namely the standard for reviewing administrators' decisions.

Not only was the issue of deferring to plan administrators' decisions not addressed by the Conference Committee, it was never addressed during the seven year period that ERISA was being developed. *At no time did Congress consider an approach that would have permitted courts to defer to plan administrators' decisions.*

The sponsors of ERISA did not propose that courts defer to administrators' decisions because they had no illusions about the impartiality of the decision-making process in employee benefit plans. Claims procedures serve an extremely important function, however they were never intended to resemble the kind of neutral forum to which courts traditionally defer.

The purpose of the ERISA claims procedures was to guarantee participants "due process in the *processing* of their benefit claims" (emphasis added). (Remarks of Senator Jacob K. Javits on introducing S.1557, the Administration's bill. April 12, 1973, 1 *Leg. Hist.* 274.) The complexity of ERISA and of plan benefit formulas make it essential that participants be given a chance to demonstrate that errors may have been made in con-

sidering their initial claim. Too often, periods of service are not properly credited or benefits are miscalculated.

While the plans' "full and fair" appeals procedures were meant to serve the vital function of allowing workers to substantiate their claims, Congress did not require those procedures to be disinterested. It recognized that most plan administrators are either company owners or officers, who may have either a personal or institutional stake in the outcome of benefit claims disputes, and that often the same person or committee rules on both the initial claim and the subsequent appeal. *See* 29 C.F.R. 2560.503-1.

In other words, Congress recognized and formalized the critically important decision-making role played by administrators in the plans' claims and appeals processes, but never intended to grant them discretion to be the final arbiters of participants' contractual rights.

D. Application of the Arbitrary and Capricious Standard Frustrates the Purposes of ERISA by Requiring Participants to Satisfy an Unrealistic Burden of Proof.

The arbitrary and capricious standard of judicial review in ERISA Section 502(a)(1)(B) cases results in undue deference to plan administrators' decisions and presents an unwarranted barrier to participants seeking to recover benefits under the terms of their plans.

The standard frustrates Congress' protective goal of ensuring that workers and their beneficiaries actually receive the pensions to which they are entitled. The standard is "a highly deferential standard of review," *Anderson* v. *Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985), and "the least demanding form of judicial review." *Pokratz* v. *Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). It favors plan administrators

and other fiduciaries over participants and beneficiaries, imposing on the latter group a "high hurdle." *Kennedy* v. *Doron Precision Systems, Inc.*, 187 U.S.Dist.LEXIS 11990 (N.D. Ill. 1987). A plan administrator's interpretation of plan administrator's interpretation of plan terms, if at all reasonable, will always prevail over a claimant's interpretation, even when it is *more* reasonable. *See McDaniel* v. *National Shopmen Pension Fund*, 817 F.2d 1370 (9th Cir. 1987). Moreover, the plan administrator's interpretation does not even have to be right so long as it was made "rationally and in good faith." *Anderson, supra.*

Even the most liberal of the many variations of the arbitrary and capricious standard would nullify the participants' reasonable expectations concerning their contract rights unless they could prove that a plan administrator's decision is "arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law."

In defense of the rule, the ERISA Industry Committee, as *amicus curiae*, points to its "flexibility", noting that very occasionally, participants have been able to establish bias on the part of the plan administrator and prevail under an arbitrary and capricious standard. ERIC Brief at 13-15. However, as Congressman Barney Frank remarked, at the 1982 hearing cited at page 19 of Petitioners' Brief, proving bias requires participants "to delve into the thoughts [and] decision-making of the plan administrator," something most participants are unable to do. *Pension Legislation: Hearings Before the Subcommittee on Labor-Management Relations of the House Committee on Labor and Education*, 97th Cong., 2d Sess. 60, 150 (1982).

For example, a participant who has been fired as a "troublemaker" may suspect that the plan's unfavorable construction of its terms is motivated by an animus

against him, but unless he is able to sustain the burden of actually proving "arbitrary" action, the plan's decision would be upheld. Similarly, a widow may realize that full payment of her claim for benefits from a small company's profit-sharing plan will significantly reduce the amounts available for the company owner and other employees, thus encouraging an interpretation favorable to the plan, but unless she can prove bad faith, that interpretation would be sustained.

Similarly, an employee who leaves a plan to work for a competitor may make a request for payments from her savings plan at a time, when it would be inconvenient for a plan administrator to liquidate an investment. Even the slightest ambiguity in plan terms could serve as a pretext for delay in making the payments since the administrator's decision would carry with it a presumption of reasonableness. In merger and acquisition situations the problem is particularly acute. Participants may have worked for years in reliance on an informally communicated interpretation of plan terms. It can be all too tempting for a new owner, with no loyalty to these employees, to adopt a new interpretation, shielded by the arbitrary and capricious standard aptly called by some management attorneys "the fiduciary's best friend."

ERIC also argues that "[u]nless the decision below is overturned, more disappointed claimants will be encouraged to challenge adverse decisions, so that the number of cases seeking review of benefit decisions is likely to increase dramatically." ERIC Brief at 12. ERIC offers no support for this assertion. In fact, rejection of the arbitrary and capricious standard for Section 502(a)(1)(B) actions might have the opposite effect. Plan administrators who knew that their decisions would be subject to scrutiny under a *de novo* standard might become less intransigent and more inclined to resolve disputes within the plans' claims procedures. This would relieve the

courts of many suits now being brought—and lost—by participants whose reasonable expectations of benefits have been frustrated by plan decisions that they contend are unreasonable. The courts would, moreover, be protected against frivolous actions by ERISA's attorneys' fees provision, permitting courts to exercise their discretion to award damages against plaintiffs. ERISA Section 502(g), 29 U.S.C. § 1132(g).

Congress enacted ERISA with "the overwhelming purpose of protecting the legitimate expectations harbored by millions of employees of a measure of retirement security at the end of many years of dedicated service." *Rettig* v. *P.B.G.C.*, *supra* 744 F.2d at 155. That purpose can only be achieved if participants are provided with *de novo* review of actions arising under ERISA Section 502(a)(1)(B).

III. ANY FORMER EMPLOYEE WHO CLAIMS THE RIGHT TO BENEFITS UNDER A PLAN IS A PARTICIPANT WITH THE RIGHT TO REQUEST INFORMATION FROM THE PLAN.

ERISA strengthened the disclosure rights of participants by making information more understandable, more individualized, and more widely available.

The statutory provision for disclosure of information to individual participants demonstrates the emphasis Congress placed on self-help, ensuring that participants and beneficiaries will actually collect the benefits to which they are entitled. Defining the term "participant" so as to include a former employee who claims a right to benefits is consistent with the statutory language and the intent of Congress.

A. A Broad Definition of the Term "Participant" Is Supported by the Statutory Language and the Legislative History of ERISA.

The statutory language.

Petitioners correctly advocate the use of a "plain language" interpretation of the statute but contradict their own position by reading in restrictions that are not in the statute.[10] ERISA generally defines "participant" as a current or former employee who is or may become eligible to receive a benefit, or who has a beneficiary who may be eligible to receive a benefit. Section 3(7), 29 U.S.C. § 1002(7).

Despite this sparse, simple language, Petitioners argue that the phrase "may become eligible" implies that an individual must satisfy numerous prerequisites before requesting information from a plan. §§ 104(b)(4), 105(a); 29 U.S.C. §§ 1024(b)(4), 1025(a).[11] According to this view, it would be the duty of the plan administrator to make a preliminary judgment as to whether the former employee seeking information has met these prerequisites.

An examination of ERISA provisions relating to participant rights supports the argument for a broad, un-

[10] This Court applied a "plain language" interpretation to statutory language in *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980), *NLRB* v. *Plasterers' Local 79*, 404 U.S. 116 (1971) and concluded that a broad, unrestricted reading of the language in question was appropriate.

[11] Examples of restrictions suggested by Petitioners and the lower court include: only current employees and vested, former employees are entitled to disclosure; currently associated with the employer; already received full distribution of benefits; must have reasonable expectation of returning to covered employment; must have a colorable claim to vested benefits; expected to attain eligibility by virtue of the passage of time; must be part of an easily identifiable group that has a substantial interest in the matters conveyed; the written request must show entitlement on its face; the employment history accompanying the request or company records must show current or future eligibility; it should not be "long since" the individual has left employment.

restricted right to request information. For example, although an individual must be a "participant covered under the plan" to be entitled to *automatic* disclosure, § 101(a), 29 U.S.C. § 1021(a), one need only be a "participant" to be entitled to disclosure of information *upon written request*. §§ 104(b)(4), 105(a); 29 U.S.C. §§ 1024(b)(4), 1025(a). Likewise, a "participant" is entitled to use the plan's claims procedure. § 503(2), 29 U.S.C. § 1133(2). Congress could not have intended to complicate what should be the simplest method of plan dispute resolution.

Similarly, the statutory language in the civil enforcement provision of ERISA does not specify any prerequisites to a court-imposed penalty on a plan for failure to disclose information, i.e., the participant is not obligated to show that plan officials were guilty of "bad faith" or "willfulness," or that the participant has been prejudiced.[12]

The real focus in this instance should be on the issue of whether former employees can obtain the information they need to establish that they *are* eligible for benefits, not the scope of the term "may become eligible for benefits." Petitioners' interpretation of the right to request disclosure would place former employees in the Catch-22 situation of being denied the very information they need to prove that they are entitled to request information.[13]

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[12] The better view is that a showing of prejudice as a result of the failure or refusal to respond to a disclosure request is not required because the civil penalty is "punitive in nature . . . [and] not intended to compensate plan participants for injuries." *Porcellini* v. *Strassheim Printing Co., Inc.*, 578 F. Supp. 605, 613-614 (E.D.Pa. 1983).

[13] The narrow Fifth Circuit view cited by Petitioners also relies on the "may become eligible" test to deny disclosure requests. *See Jackson* v. *Sears, Roebuck & Co.*, 648 F.2d 225 (5th Cir. 1981); *See also Nugent* v. *Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980). Both these cases are easily distinguishable from the instant

The legislative history.

Petitioners correctly assert that Congress was disappointed with the exclusive monitoring role given to participants and beneficiaries under the Welfare Pension Plan and Disclosure Act.[14] There is no question that ERISA expanded the role of the government in collecting information and protecting plan assets. However, Congress did not abandon the important tool of participant self-help. To the contrary, ERISA increased the amount of general plan information and individualized information available upon request to all participants and beneficiaries. Specifically, ERISA added the right to obtain, *inter alia*: a summary plan description ("plan booklet") that provides a "plain language" explanation of the plan's eligibility rules, § 104(b)(4), 29 U.S.C. § 1024(b)(4); and an individualized benefit statement ("benefit statement"). § 105(a), 29 U.S.C. § 1025(a).

The benefit statement, in particular, provides an extremely valuable tool for protecting one's interests in a pension plan. Unlike the plan booklet or other general plan documents, this is the only document that is "tailor-made." It indicates the individual's benefit amount and

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case. Each involved a former employee who admitted that she had not worked enough years to vest but was claiming that, but for her involuntary termination, she would have vested. In contrast, the Respondents are asserting that they are entitled to information because they are currently entitled to benefits. As the Fifth Circuit correctly recognized in a separate case, "at the time of this [disclosure] request, their status was far from clear, and we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement." *Paris* v. *Profit Sharing Plan, Etc.*, 637 F.2d 357, 362 (5th Cir. 1981).

[14] Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), *amended by* Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, 76 Stat. 35 (1962) (formerly codified at 29 U.S.C. Sections 301 *et seq.*), repealed by ERISA § 111(a)(1), 29 U.S.C. § 103(a)(1).

shows whether the individual has met the plan's length-of-service requirement.[15]

Although there is very little legislative history on the intended scope of the definition of "participant," there is other evidence that Congress did not intend to restrict the former employee's right to disclosure. In a predecessor bill to ERISA, a "participant" was defined as an active employee, and a "beneficiary" as "an individual who is receiving (*or claims a right to receive*) benefits under a qualified plan." (emphasis added).[16]

Congress was well aware that participants gain from having financially-stable plans as well as from having information about their plans. The disclosure provisions of ERISA reflect the extensive effort that was made to minimize the burden on plans. To illustrate, the administrator may make a reasonable charge for providing copies of all the general plan documents that are requested, § 104(b)(4), 29 U.S.C. § 1024(b)(4). Also, the plan is required to provide a participant with only one benefit statement within a twelve-month period. § 105(b), 29 U.S.C. § 1025(b). An obvious, but significant limitation that Petitioners fail to point out, is that information provided upon request need only be sent to the former employee who identifies himself to the plan (and presumably, provides a return address). These provisions apply only to specific individual requests and clearly do not require plans to "track down" every former employee.

In addition, there are numerous statutory exemptions to the disclosure rules.[17] Nevertheless, relief from the

[15] The individualized benefit statement was considered "one of the greatest reforms in the whole bill" because it enabled a participant to "understand exactly . . . where he stood at the moment of his inquiry." H.R. Consideration of Conference Report to accompany H.R. 2, 93d Cong., 2d Sess. (1974), 3 *Leg. Hist.* 4655.

[16] S. Rep. No. 383, 93d Cong., 1st Sess. (1973), 1 *Leg. Hist.* 1185.

[17] The statutory exemptions are available, *inter alia*, to various types of plans as well as to smaller plans. *See, for example*:

disclosure requirements was not provided at the expense of participants and beneficiaries. In certain circumstances, ERISA does permit an "alternative method of compliance." The plan administrator, however, may obtain an exemption from the Secretary of Labor only if the Secretary has determined that the alternative method still provides adequate disclosure and that following the standard rules would harm the plan and the interests of the participants. Section 110, 29 U.S.C. § 1030.

A comparison of the various methods of disclosure available under ERISA reveals a deliberate design by Congress to balance the burden on the plan according to the number of individuals eligible for disclosure, i.e., the burden on a plan narrows as the category of recipients expands. As an example, the general public may inspect certain plan documents (such as annual reports and plan booklets) filed with the Department of Labor, a method least burdensome to plans. § 104(a)(1), 29 U.S.C. § 1024(a)(1). A more demanding requirement is a plan's obligation to provide other documents (such as summary plan booklets) automatically and without charge, but this requirement extends only to "covered participants and beneficiaries receiving benefits." § 101(a), 29 U.S.C. § 1021(a). Between these two extremes lies the right of "participants and beneficiaries" to view documents at the plan office and to request documents from the plan, §§ 104(b)(2),(4), 29 U.S.C. §§ 1024(b)(2),(4). Thus, it is consistent with the statutory scheme and not overly burdensome to allow individual former employees who claim eligibilty to request information from their plans.

The benefits of a broad disclosure right will far outweigh the costs to plans. It is highly unlikely that plans will be flooded with frivolous requests from persons with

29 U.S.C. §§ 1023(a), 1023(b)(4), and 1024(a). In addition, Congress was careful to limit the frequency with which these documents must be provided. *See* 29 U.S.C. Sections 1024(a)(1)(B), 1024(b)(1) and 1025(b).

no genuine interest in learning about their benefits. (In fact, too few people seek to understand their plan provisions, according to a recent government study.)[18] Providing greater access to this information means that more participants will be able to evaluate their own claims and guage the worth of pursuing an administrative appeal or litigation.

Given the extensive effort of Congress to avoid burdening plans unnecessarily, the purpose of ERISA would be best served if a "claim of undue burdens is properly addressed to Congress, not this court." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 123-124 (1980).

B. An Inclusive Disclosure-of-Information Requirement Serves The Purposes of ERISA By Making It Easier For Individuals To Claim Benefits.

There are over a million private pension and welfare plans in the nation. Although ERISA establishes the minimum standards for these plans, benefit eligibility rules vary widely from plan to plan, leaving employees dependent on obtaining specific information from their respective plans. Eligibility for benefits may rest on whether an employee has met a complicated length-of-service rule or whether the employee can prove certain facts.

Under the restrictive disclosure rules advocated by Petitioners, there is a danger that a plan administrator might wrongly assume that a former employee is not eligible for benefits and therefore not entitled to the information. Yet, without the information they need, former employees who reasonably believe they are eligible

[18] *See* Briefing Report to the Chairman, House Select Committee on Aging, 100th Cong., 1st Sess., *Pension Plans: Many Workers Don't Know When They Can Retire* (General Accounting Office (HRD-87-94BR, 1987). This study found that over 70% of the 25 million workers in pension plans were not correct about when they would be eligible for normal retirement benefits, at 2.

for benefits will be unable to determine what proof they must gather or whether the administrator is applying the plan rules incorrectly.

Since the plan administrator is not required to be a legal expert (or to have any other particular skills), an erroneous determination is not improbable.[19] In a small plan, the "administrator" may be the small business owner himself.

Furthermore, where the employer serves as the administrator, as in this case, there is the obvious risk of a conflict of interest. Surely a "self-selecting" interpretation, as Petitioners label the appellate court approach that lets the individual determine that information is needed, is superior to an "administrator-selecting" interpretation. Allowing the administrator to deny information on the basis of a preliminary judgment about the employee's eligibility adversely affects the rights of participants. Meritorious claims for pension benefits may be lost, plan sponsors will gain unfairly, and the courts will be clogged with unnecessary claims from those individuals who have the means to litigate. Excluded will be the many participants who cannot afford to file a lawsuit in order to merely obtain information needed to establish eligibility to a small pension.[20]

[19] The plan administrator can be the plan sponsor, or can be designated by the terms of the plan, 29 U.S.C. § 1002(16).

[20] Participants may decide on their own that the effort involved in fighting for the information is not worth the potential benefit. Or the plan administrator may actively discourage future claims by paying out inaccurate lump sums and then claim that the requestor is no longer eligible for benefits, and thus, no longer eligible for disclosure. The employer who has "unchecked power to make a final distribution of a participant's interest . . . would be totally insulated from inquiry concerning an ex-employee's rights under the plan. Congress could not have intended such an inequitable and absurd result." *Hager* v. *VECO Corporation*, 1 Employee Benefit Cases 1827 (N.D. Ill. Aug. 16, 1979).

Unlike employees with workers compensation or age discrimination claims, individual workers asserting rights under ERISA cannot look to any government agency to resolve their cases. Also, unfortunately, the Labor Department does not adequately carry out the reporting and disclosure responsibilities that are assigned to it, and its records are often out of date or incomplete. *See* Staff of Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 99th Cong., 2d Sess. *The Department of Labor's Enforcement of ERISA* (S.Prt. 99-144, at 25, 1986).

A right to request information that extends to former, as well as current, employees who claim eligibility is essential to ensure that workers and retirees receive the pensions to which they are entitled.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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No. 87-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,
vs.
RICHARD BRUCH, ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Does not the content, the legislative history, and the overall purpose of ERISA mandate, at a minimum, that all employee benefit claim decisions falling outside of the LMRA "collective bargaining" context be subject to a non-deferential judicial standard of review?

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INTEREST OF AMICUS[1]

Amicus Plaintiff Employment Lawyers Association ("PELA") is a non-profit organization. PELA has six hundred fifty-six (656) members in forty-nine (49) states who specialize in representing employees in civil litigation concerning employment and labor matters. PELA members regularly encounter issues arising under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C 1001 et. seq. ("ERISA"). PELA is therefore uniquely positioned to offer practical insights on behalf of those for whose benefit ERISA was enacted.

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[1] This brief was filed with the consent of the parties. The evidence of such consent is on file with the Clerk of the Court pursuant to Rule 36 of this Court.

INTRODUCTORY STATEMENT

This case presents important questions about the scope of judicial review of decisions on ERISA benefit plan claims. Such claims include those for pensions, disability benefits, health care benefits, and for severance pay. Presently, such claims are subject to a deferential standard of review which places employees and their beneficiaries at a distinct disadvantage.[2] To satisfy the "substantial evidence" element of the standard,

[2] Under the standard, a decision will be overturned only if it is "arbitrary and capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law. E.g., Wardle v. Central States Pension Fund, 627 F.2d 820 (7th Cir. 1980); Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982); and Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1093 (9th Cir. 1985).

a benefit plan need only develop "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion ...more than a scintilla but somewhat less than a preponderance of evidence ...such evidence as would be sufficient to justify submission of the issue to a jury." Tomlin v. Bd. of Trustees of Const. Laborers, 586 F.2d 148, 151 (9th Cir. 1978). Thus, a decision can be upheld even if later shown to be wrong, despite the resulting injustice to the concerned claimant.

PELA supports the decision below to adopt a "de novo" standard of review.[3] The Third Circuit's opinion thoroughly

[3] The decision was rendered by the Third Circuit, reversing the District Court. Said decision is reported at 828 F.2d 134.

analyzes the development of the "arbitrary and capricious" standard and its prior application to claims arising under both the Labor Management Relations Act of 1947, 29 U.S.C. 141 et seq. ("LMRA") and ERISA. Its decision to reject said deferential standard of review in certain ERISA cases reflects a careful balancing of policy considerations, which is consistent with the overall Congressional objectives in enacting ERISA.

The Third Circuit's analysis should be extended beyond the "conflict of interest" setting of this case. A non-deferential judicial standard of review should, <u>at the minimum</u>, be adopted for all ERISA cases falling outside of the "collective bargaining" context of benefit plans set up under Section

302(c)(5) of the LMRA, 29 U.S.C. Section 186(c)(5).

The Third Circuit has offered a compelling analysis of why a deferential standard of review may be appropriate under the LMRA yet flawed under ERISA. ERISA lacks the LMRA's built-in protections to police against abuses by fiduciaries. Congress clearly intended for civil actions to serve as ERISA's policing mechanisms. Such actions cannot serve this purpose, however, under the arbitrary and capricious standard. It unfairly insulates fiduciaries from accountability in all but the clearest of cases.

The Third Circuit's decision recognizes the errors of prior decisions applying the arbitrary and capricious standard.

This case now presents the Supreme Court with an extraordinary opportunity to do justice by exercising its supervisory powers to similarly correct an unwise trend to apply the deferential standard of review in ERISA benefit cases.

SUMMARY OF ARGUMENT

1. It is the overriding policy of ERISA to safeguard the well being and security of working men and women. That policy is not furthered by the arbitrary and capricious deferential standard.

2. Congress never intended that a deferential standard of review be incorporated into ERISA from the common law of trusts. In fact, the trust relationships present in ERISA benefit plans are significantly different from those found in the common law. Contract

analysis is more appropriate.

3. ERISA lacks the LMRA's built-in protections promoting impartiality. A "de novo" standard of review is therefore necessary, at least as to claims arising outside of the LMRA collective bargaining context, in order to safeguard the rights and obligations created by ERISA.

4. The arbitrary and capricious standard violates the plain meaning of the "prudent man" standard and the "exclusive benefit" rule of 29 U.S.C. 1104(a). It is inconsistent with the overall structure and legislative history of ERISA. Various cases have struggled to cope with this inconsistency, and with inequities resulting from strict adherence to this product of judicial common law. Numerous exceptions and exclusions

to the arbitrary and capricious standard have therefore developed. While they are understandable and just, these exceptions and exclusions have created a "double standard" that does little to foster important societal needs for certainty and uniformity of the law. It is time to therefore make a clean break and expressly abandon the arbitrary and capricious standard.

5. The arbitrary and capricious standard works a substantial injustice upon those for whose benefit ERISA was enacted. Workers make substantial contributions to the benefit plans in which they are participants. These include actual money payments <u>and</u> compensation received in the indirect form of benefit plan protections. The

deferential standard has not satisfied reasonable expectations of security and protection that the benefit plans are intended to provide. The deferential standard also fosters unequal treatment of the citizenry under the law. In the non-pension context, benefit plan participants and beneficiaries have far fewer legal rights and protections with the deferential standard than do individuals who have privately contracted for their own protection through annuities or policies of health and/or disability insurance. A "de novo" standard would help to put benefit plan claimants back on an equal footing with the rest of society.

ARGUMENT

I. IN ENACTING ERISA, CONGRESS SOUGHT TO REFORM EXISTING LAW SO AS TO BETTER SAFEGUARD THE WELL BEING AND SECURITY OF WORKING MEN AND WOMEN. ERISA IS TO BE BROADLY CONSTRUED SO AS TO GIVE EFFECT TO THAT PURPOSE.

This brief relies upon a recent, comprehensive reference study of ERISA, of its legislative history, and of its interpretive cases.[4] In discussing ERISA's intended policy, the study observes that Congress expressed dissatisfaction with the pre-existing law's ability to "adjust inequities visited upon plan participants."[5]

[4] S. Bruce, "Pension Claims: Rights and Obligations" (BNA, 1988).

[5] Id., Chapter 7, page 314, citing to S. Rep. 93-127, at 5, 1 ERISA Leg. Hist. 591 and H.R. Rep. 93-533 at 5, 2 ERISA Leg. Hist. 2352.

Continuing, the author notes that both the Senate Committee on Labor and Public Welfare and the House Education and Labor Committee reports on ERISA observed that "courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording."[6]

The Congressional leaders adopting ERISA viewed pensions as a form of deferred compensation to be safeguarded. They viewed ERISA benefits as a matter of contract right, and took steps to make pension plans more viable contracts.[7] That view is undermined by an "arbitrary

[6] Id.

[7] Id., at page 315-16, quoting from legislative history.

and capricious" standard of review.[8]

ERISA's statement of Congressional Findings and Declarations of Policy also reflects an intent to improve the rights of workers. For example, 29 U.S.C 1001(b) states that it is ERISA's intended policy to protect "the interests of participants in employee benefit plans and their beneficiaries by ... [among other things] establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to

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[8] Id., at pages 314-15, referencing remarks by Senators Harrison Williams and Jacob Javits, two chief Senate leaders and sponsors of ERISA, as well as comments by Representative Carl Perkins, who was the Chairman of the House Education and Labor Committee when ERISA was enacted.

the federal courts." (bracketed material added.)

Congress reiterated its intent by adopting the "prudent man" standard of care for ERISA fiduciaries, mandating that they discharge their duties "solely in the interest of the participants and beneficiaries ..."[9] Congress also made

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[9] This "prudent man" standard is found at 29 U.S.C. 1104 (a). In pertinent part, it provides:

"(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would

clear that ERISA's provisions were to be broadly construed, consistent with its underlying purposes. Thus, Senate Report Number 93-127 states: "It is intended that coverage under the Act be construed liberally to provide a maximum degree of protection to working men and women covered by private retirement programs." Reprinted in [1974] 3 U.S. Code Cong. & Admin. News, page 4854.

The courts have uniformly recognized ERISA's remedial purposes, holding that it is to be liberally construed so as to safeguard the well being and security of working men and women.[10]

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use in the conduct of an enterprise of a like character and with like aims . . ."

[10] E.g., Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984), Amato v. Western Union Intl., Inc., 773

II. ERISA'S POLICY IS NOT FURTHER BY A DEFERENTIAL STANDARD OF REVIEW. CONGRESS NEVER INTENDED THAT SUCH A STANDARD BE IMPORTED FROM THE COMMON LAW OF TRUSTS. PRIOR CASES ADOPTING SUCH A STANDARD SHOULD BE REJECTED.

When a benefit plan administrator interprets benefit plan provisions and makes determinations on individual benefit claims, he is functioning as a fiduciary.[11] Although ERISA provides fiduciaries with some discretionary authority, Congress never intended to insulate fiduciaries from accountability. Congress would not have mandated a strict, "prudent man" standard of care if fiduciary decisions were to be so

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F.2d 1402, 1409 (2d Cir. 1985), and Rettig v. PBGC, 744 F.2d 133, 135 (D.C. Cir. 1984).

[11] 29 U.S.C. 1102(a).

insulated.[12] ERISA's structure instead demonstrates that fiduciaries are to be fully accountable for their actions. It provides a mechanism for remedying fiduciary violations, by providing ready access to the courts.[13] Congress encouraged civil actions to remedy fiduciary misconduct by authorizing awards of attorney fees to claimants in litigation. Congress also provided for a very lengthy statute of limitations for

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[12] 29 U.S.C. 1104(a).

[13] 29 U.S.C. 1132(a)(1)(B) authorizes actions not only to recover benefits, but also to enforce other rights and clarify the right to future benefits. 29 U.S.C. 1132(f) emphasizes the importance attached by Congress to encouraging actions to safeguard rights under ERISA: it provides for jurisdiction in the district courts "without respect to the amount in controversy or the citizenship of the parties . . ."

actions based upon a fiduciary's breach of "<u>any</u> responsibility, duty, or obligation." 29 U.S.C 1113(a). (emphasis added.)

Despite this clear expression of legislative intent, the courts have nevertheless generally applied an "arbitrary and capricious" standard of review in examining the claims decisions of ERISA fiduciaries. The Third Circuit is to be commended for its exhaustive examination of how the arbitrary and capricious standard originated under the LMRA and was thereafter extended to employee benefit cases under ERISA.[14]

The Third Circuit has correctly observed significant differences between

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[14] See 828 F.2d at pages 138-45.

benefit plans arising under the LMRA and ERISA. The LMRA sets out elaborate requirements intended to protect the benefit plans it authorizes from being controlled by a party biased toward either the employees or employer. In contrast, ERISA has no such protections. The briefs of Petitioners and their Amici fail to fully address this aspect of the Third Circuit's analysis. They instead focus on the common law of trusts. They contend that it mandates a deferential standard and that Congress intended for it to form the exclusive basis for the review of a fiduciary's decisions.

Petitioner's argument is based upon an incomplete examination of legislative history, and also upon an incomplete analysis of the common law of trusts.

ERISA's "prudent man" standard, and a "de novo" standard of review, are in fact consistent with the common law of trusts.[15] In fact, Congress recognized and intended that ERISA would involve modifications and alterations of common law trust concepts. The committee reports observed that employee benefit plans are very different from the testamentary and inter vivos trusts upon which trust law was founded.[16] Scholarly

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[15] See Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983), cert. denied 464 U.S. 1040 (3d Cir. 1984). This case found the "prudent man" standard to be mandated by ERISA's explicit language and legislative history. It also found the test to be consistent with the common law of trusts, citing III Scott on Trusts Section 187.2 at 1514 and n.2; Sections 227-227.3, at 1805-12.

[16] "Pension Claims: Rights and Obligations," supra, at page 317, including footnote 84.

studies have concluded that "the balancing of conflicting interests of current and future claimants that supported the arbitrary and capricious standard under traditional trust law is absent under ERISA."[17]

ERISA, unlike the LMRA, has no equal representation requirements to assure that the plan fiduciaries are impartial. In fact, the non-LMRA benefit plans are typically controlled by the employer, and not by a group evenly divided between employer and employees. The employer adopts the governing Plan document, and selects and often supervises the Plan fiduciaries. Employees have little or no

[17] Id., at page 317-18, citing R. Gilbert, "Fiduciary Duties Under ERISA," 43 Inst. on Fed. Tax'n, at 33-6 (1985).

voice, and must typically rely upon the good faith of the employer and plan administrators. In this non-LMRA context, there is a significant danger that the plan fiduciaries will not be impartial, particularly if the fiduciary's decision has a direct or indirect financial impact upon the employer. ERISA's only real safeguard against such bias is civil litigation by aggrieved benefit plan claimants. A "de novo" standard of review is therefore essential if such actions are to effectively police fiduciary conduct.

A "de novo" standard of review is consistent with the Congressional objective of fiduciary standards which are "more exacting" than that found prior

to ERISA.[18] A "de novo" standard also conforms to the Congressional committee report statement that ERISA fiduciary standards should be interpreted "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act."[19]

Petitioners and their Amici argue that other mechanisms can insure that fiduciaries comply with the minimum requirements of ERISA. The experience of PELA members is much to the contrary, however. Defense interests enjoy many

[18] Donovan v. Mazzola, supra, 716 F.2d at 1231.

[19] S. Rep. 93-127, at 29, 1 ERISA Leg. Hist. 615; H.R. Rep. 93-533, at 29, 2 ERISA Leg. Hist. 2359; and Conf. Rep., at 302, 3 ERISA Leg. Hist. 4569. Each is discussed at page 317 of "Pension Claims: Rights and Obligations," supra.

advantages in ERISA litigation. Combined with the arbitrary and capricious standard, those advantages make ERISA litigation a perilous undertaking for benefit plan claimants. Unsophisticated plaintiffs have their claims dismissed for failure to first exhaust administrative remedies;[20] ERISA claims generally are not subject to trial by jury;[21] when a claims decision is shown

[20] Claimants must exhaust ERISA administrative remedies as a prerequisite to filing suit. E.g., Amato v. Bernard, 618 F.2d 559, 567-68 (9th Cir. 1980); Denton v. First National Bank, 765 F.2d 1295, 1303 (5th Cir. 1985); Mason v. Continental Group, Inc., 763 F2d 1219, 1227 (11th Cir. 1985).

[21] In re Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980); and dicta in Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984), cert. denied, 449 U.S. 1112.

to violate ERISA, the remedy is typically only a remand for further administrative proceedings, rather than relief on the merits;[22] extra-contractual damages are generally not available to provide full relief and to make contingency representation by counsel feasible;[23] and attorney fee awards have not filled in

[22] Blau v. Del Monte Corp., supra, 748 F.2d at page 1353; Wolfe v. J.C. Penney Co., 710 F.2d 388, 393 (7th Cir. 1983).

[23] Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, (1985) foreclosed the recovery of extra-contractual damages under 29 U.S.C. 1109, and Circuits have since held that such damages are not available in other ERISA actions. E.g., Sokol v. Bernstein, 803 F.2d 532, 534-38 (9th Cir. 1986); Powell v. C. & P. Tel. Co. of Virginia, 780 F.2d 419, 424 (4th Cir. 1985), cert. denied 476 U.S. 1170 (1986).

the resulting gap.[24]

III. THE ARBITRARY AND CAPRICIOUS STAN-DARD VIOLATES THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION. IT IS INCONSISTENT WITH ERISA's OVERALL STRUCTURE AND LEGISLATIVE HISTORY. THE COURTS HAVE STRUG-GLED TO COPE WITH IT. THE RESULT HAS BEEN A COMPLICATED BODY OF CASE LAW, WITH MANY EXCEPTIONS TO THE DEFERENTIAL STANDARD. THE COURT SHOULD RESTORE CERTAINTY AND UNIFORMITY TO THE LAW, BY ELIMINATING THE ARBITRARY AND CAPRICIOUS STANDARD.

[24] Few attorneys can afford to represent ERISA claimants based on hopes of a discretionary fee award under 29 U.S.C. 1132(g). See "Pension Claims: Rights and Obligations," supra, at 675-77. The standards for awarding fees have only recently been settled. E.g., Pennsylvania, et al. v. Delaware Valley Citizens' Council for Clean Air, et al., ____U.S.______, 106 S. Ct. 3088 (1986) ("Delaware Valley I") and Pennsylvania, et al. v. Delaware Valley Citizens' Council for Clean Air, et al., _____U.S. ___, 107 S. Ct. 3078 (1987) ("Delaware Valley II"). How the Circuits will apply the standards to ERISA remains to be seen.

This honorable Court has found that ERISA seeks to comprehensively regulate employee pension and welfare plans.[25] When faced with issues of statutory interpretation under ERISA, despite ERISA's acknowledged statutory complexity,[26] the Court has felt compelled "to begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Metropolitan Life Ins. v.

[25] Pilot life Ins. Co. v. Dedeaux, ___U.S.____, 107 S.Ct. 1549 (1987); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 2896 (1983), and Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 732, 105 S.Ct. 2380 (1985).

[26] ERISA is a "comprehensive and reticulated statute." Nachman Corp. v. PBGC, 446 U.S. 359, 361, 100 S.Ct. 1723 (1980).

Massachusetts, supra, 471 U.S. at Page 740. In construing ERISA, the court has also found it helpful to look to the overall structure of the Act, and at ERISA's legislative history. Finally, the court has firmly rejected any "blue pencil" method of statutory construction under ERISA, and has instead insisted that ERISA's provisions be interpreted in "the relevant contexts in which statutory language subsists." Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085 (1985). Other rules of statutory construction applicable to ERISA are summarized well in Amato v. Western Union Intern., Inc., 773 F.2d 1402, 1408 (2d Cir. 1985). These guiding principles of construction are all relevant in considering the proper

standard of judicial review for benefit claim decisions by ERISA fiduciaries.

A deferential standard of judicial review ignores the plain language of 29 U.S. 1104(a), and also violates the Court's "blue pencil" prohibition. Such a standard of review is also inconsistent with the overall structure of the Act, because it tends to defeat and render superfluous the "six carefully-integrated civil enforcement provisions found in section 502(a) of the statute [29 U.S.C. 1132(a)] ...." Mass. Mutual Life Ins. Co. v. Russell, supra, 473 U.S. at page 146. The civil enforcement mechanisms can do little to safeguard the rights of employees when a deferential standard of judicial review is employed.

Many courts have struggled with the

obvious inequities of the arbitrary and capricious standard of review. Those inequities were discussed as follows by one district court judge, regarding the Fifth Circuit's adoption of the deferential standard in Bayles v. Central States, Southeast, etc., 602 F.2d 97, 99 (5th Cir. 1979):

> "That holding perplexes this court. It allows an employer to breach his employee's compensation contract with impunity, so long as the employer does not do so in an "arbitrary or capricious" manner. The administrator may be stupid, or simply ignorant, or ill-advised on the meaning of the contract. No matter. He may breach and breach again, yet the employee cannot enforce his rights.
>
> With the social security retirement system in a shambles and its bankruptcy imminent, private benefit plans offer most workers their only hope of security in old age or disability. To an older worker, his pension rights may be more valuable than his salary. He can enforce those valued rights however, if and only if he can prove

the contract's breach to be 'arbitrary and capricious' ...The court believes that disputes over employment contracts - including pension and disability benefit plans - are most rationally, economically, and equitably resolved by the application of traditional contract principles. It is, after all, a contract the Court is being asked to interpret. ...Basic contract concepts and terms do not, of course, convey absolutely precise meaning. But they carry substantially more meaning than the slippery concept of 'arbitrary and capricious'. Requiring that 'standard' of review makes for a paucity of legal analysis. It substitutes conclusory phrases for specific supporting factual determinations."[27]

Imaginative counsel and courts have developed "refinements" or "exceptions" to the arbitrary and capricious standard,

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[27] Hayden v. Texas - U.S. Chemical Co., 557 F. Supp. 382, 389-90 (E.D.Tex. 1983) on remand from, 681 F.2d 1053 (5th Cir. 1982). This case is discussed at pages 322-24 of "Pension Claims: Rights and Obligations," supra.

in an attempt to avoid overly harsh results.[28] Thus, decisions interpreting benefit plan provisions have been held to be "arbitrary and capricious" where they depend upon a plan interpretation which is inconsistent with the "plain meaning" of the plan document.[29]

Similarly, the courts have overturned interpretations differing from a benefit

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[28] "Pension Claims: Rights and Obligations," supra, at pages 324-46, beginning with a discussion of Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982).

[29] Id., at pages 325-26, including citations to Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984) cert. denied, 474 U.S. 865 (1985) and Morgan v. Mullins, 643 F.2d 1320 (8th Cir. 1981).

plan's past practice or custom.[30] Still other courts have required strict procedural compliance by plan fiduciaries as a prerequisite to application of the arbitrary and capricious standard.[31] Still other classes of ERISA cases appear to have abandoned the arbitrary and capricious standard of review altogether.[32] These cases specifically

[30] Id., at pages 328-30, including a citation to Kann v. Keystone Resources, Inc. Profit Sharing Plan, 575 F. Supp. 1084 (W.D.Pa. 1983).

[31] Id., at pages 343-45, including citations to Struble v. New Jersey Brewery Employee's Welfare Fund, 732 F.2d 325 (3d Cir. 1984), Blau, supra, and Short v. Central States Pension Fund, 729 F.2d 567 (8th Cir. 1984).

[32] Id., at pages 358-64. Cited case examples include Central Hardward Co. v. Central States Pension Fund, 770 F.2d 106 (8th Cir. 1985), cert. denied, 475 U.S. 1108 (1986) and Struble v. New Jersey Brewery Employees Welfare Fund, supra.

involve issues of trustee authority, interpretations of single-employer collectively bargained plans, some insurance contracts, and class interpretations.

Despite these exceptions and "refinements", the vast majority of individual benefit claims under ERISA are still subjected to a deferential standard of review. Thus, the courts frequently find themselves treating classes of ERISA cases differently, despite the fact that each such case is subject to the same governing statute. The result is a chaotic lack of uniformity and certainty under the law. The situation therefore merits this court's supervisory intervention.

IV. A DEFERENTIAL STANDARD FAILS TO MEET THE REASONABLE EXPECTATIONS OF EMPLOYEES. IT CREATES A DOUBLE STANDARD THAT CONGRESS COULD NOT HAVE ENVISIONED OR INTENDED. BENEFIT PLAN PARTICIPANTS AND BENEFICIARIES END UP WITH FEWER RIGHTS AND PROTECTIONS THAN DO INDIVIDUALS WHO HAVE SEPARATELY CONTRACTED FOR PROTECTION THROUGH POLICIES OF INSURANCE.

As was noted above, the drafters of ERISA sought to treat employee benefits as being a form of compensation. A substantial percentage of ERISA welfare benefit plans are at least partially funded by direct contributions from employees. Thus, the 1986 Johnson and Higgins Corporate Health Care Benefits Survey ("Survey") shows that nationwide over 40% of employers require employees to contribute toward insurance premium for health care benefits for themselves, and approximately 70% require employees

to contribute toward premiums for dependant coverage. (Survey, Pages 26-27). The Hewitt Associates Salaried Employee Benefits Provided by Major U.S. Employers in 1986 ("Study") shows that nationwide 74% of large employers, a group including 96% of the Fortune 100 industrials, require employee contributions either for employee or dependant medical care coverage. (Study, Page 27). Moreover, the Hewitt Associates Salaried Employee Benefits Provided by Major U.S. Employers: A Comparison Study, 1981 through 1986 ("Comparison Study") shows that nationwide during a recent five year period, there was a marked trend for ERISA health care plans toward requiring employee contributions - an additional 10% of large employers have now imposed

such a requirement (Comparison Study, Page 29).

The employees who participate in these ERISA benefit plans view such participation as a substitute for private insurance. They are making direct "out of pocket" payments expecting to obtain the same protection that one's private insurance affords. By definition, such participation gives rise to reasonable expectations of security and protection in an event of an incident giving rise to a claim. The analysis above, however, demonstrates that the arbitrary and capricious standard of review can lead to results which do not meet the individual employee's reasonable expectations.

In contrast, the individual who privately contracts for his own health,

disability, or annuity insurance receives far better treatment from the courts in the event of litigation over a disputed claim. Such disputes fall outside the scope of ERISA, and are subjected to a "preponderance of the evidence" test.[33] The courts apply principles of contract analysis to such disputes.

Surprisingly, there has been little discussion of this "double standard" in the law's treatment of its citizenry in reported ERISA decisions. It seems highly unlikely that Congress could have intended such a result, in view of the clear statements that ERISA was intended

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[33] See Couch on Insurance 2d (Rev. Ed.) Section 79:314-19, cited on Page 365 of "Pension Claims Rights and Obligations", supra.

to provide employees with <u>increased</u> security and protection.

Ultimately, this "double standard" will operate to discourage individual participation in ERISA group benefit plans, contrary to the intent of Congress. Unfortunately, the average worker often does not realize or appreciate the impact of this "double standard" until after the incident giving rise to his/her claim occurs. It is then too late for the employee to make alternate arrangements for security and protection. A decision to abandon the arbitrary and capricious standard of review would help to eliminate the "double standard" and place all citizens with benefit claims on equal footing in the eyes of the law.

CONCLUSION

The arbitrary and capricious standard is an anomaly which runs counter to the clear purpose and intentions of Congress in enacting ERISA. In operation, it is inherently unjust. A "de novo" standard of review is more appropriate, and was properly applied in the proceedings below. The decision of the Third Circuit should therefore be upheld.

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